Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JOHN HADLEY FISHER,
Petitioner,

v.

GARY GIBSON, Warden; DREW EDMONDSON,
Attorney General of the State of Oklahoma,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does an incompetent individual's constitutional right to not be tried while incompetent merit the safeguard of equitably tolling the §2244(d) limitations period of the AEDPA in the extraordinary circumstance of said individual remaining incompetent thereby unable to seek appellate relief on his own behalf ?

Can an incompetent individual default the procedural time limitations of §2244(d) within the AEDPA?

Does an incompetent individual's default of the procedural limitations period imposed by the AEDPA's §2244(d) violate the Suspension Clause, U.S. Const. Art. 1, §9, cl. 2, where said individual can prove on the existing record he suffered constitutional violations which materially impacted and effectuated his trial; i.e., allowing an incompetent person to plead guilty in violation of the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDINGS

Petitioner

John Hadley Fisher

Respondents

Gary Gibson, Warden

Drew Edmondson, Attorney General of the State of Oklahoma

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John Hadley Fisher respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. A at 1a-2a. The opinion of the court of appeals on the merits is reported at 262 F.3d 1135 (10th Cir. 2001) and is reproduced in App. B at 3a-22a. The opinions and orders of the United States District Court for the Eastern District of Oklahoma are unreported and are reproduced in App. C at 23a-39a and in App. D at 40a-51a. The opinions and orders of the United States District Court for the Western District of Oklahoma are unreported and are reproduced in App. E at 52a-54a, App. F at 55a-67a, App. G at 68a-69a, and in App. H at 70a-73a, respectively.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on August 22, 2001. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on October 29, 2001. This Court has jurisdiction under 28 U.S.C. § 1254 (1). Because 28 U.S.C. § 2403(a) may apply, as such, the Solicitor General of the United States has been served, even though the appellate court did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question pursuant to 28 U.S.C. § 2403 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Clause 2 of the United States Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const. Art. I, § 9, cl. 2.

The Fifth Amendment to the United States Constitution provides, in part, that "nor shall any person ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides in part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

This case arises from the denial of habeas corpus relief to a man who is on the existing record "more likely than not incompetent" through the application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amendments to the writ of habeas corpus.

A. Mental Health And Competency History

Mr. Fisher's mental health treatment began at age twelve when he began to see a licensed counselor, Mrs. Ann Benjamin and, thereafter, he was being treated on a periodic basis by Dr. Stewart Beasley, Ph.D. Psychologist. In the two years preceding the acts for which he was arrested, Mr. Fisher was being seen several times weekly by Dr. Katrina Bright, Ph.D. Psychologist, and Dr. A.W. Rousseau, M.D., Psychiatrist, and was prescribed various psycho tropic

medications, including Prozac, Lithium and Mellerill; later, he was hospitalized for treatment in 1990 at Mercy Health Center in Oklahoma City, Oklahoma, for what had become frequent exhibitions of psychotic, obsessive, bizarre, anti-social and depressed behavior.

Mr. Fisher's competency history began subsequent to his arrest and is chronicled within the various orders and opinions of the courts below: See App. B at 5a-10a, App. C at 31a-36a, App. D at 44a-48a, App. E at 52a and App. F at 58a-64a, respectively. See also App. K at 86a-88a and App. M at 101a-118a.

B. Incompetency And Equitable Tolling

This action involves Mr. Fisher's constitutional right not to be tried and convicted while incompetent, in violation of procedural and substantive due process. U.S. Const. amends. 5 and 14. And, whether the AEDPA period of limitations, as set forth in 28 U.S.C. § 2244(d)(1)(A)-(D), is sufficiently protective in the circumstance of an incompetent individual's inability to formulate appeals or exercise due diligence. Should the AEDPA statute of limitations preclude Mr. Fisher from habeas relief, a fundamental constitutional question must arise: does the AEDPA in the above circumstances render the writ of habeas corpus inadequate and ineffective to test the legality of Mr. Fisher's imprisonment in violation of the Suspension Clause, U.S. Const. Art. 1, § 9, cl. 2.?

Perhaps no other issue has taken up the time of the federal judiciary as to the exact application of equitable tolling, in relation to 28 U.S.C. § 2244(d)(1)(A)-(D). The Ninth and Tenth Circuits are the only appellate courts to issue published opinions addressing incompetency effectuating equitable tolling, and these

opinions are in conflict. The constitutional import of safeguarding an incompetent individual's right not be tried while incompetent compounded with the need of this Court to resolve discrepancy among the federal circuit courts and to authoritatively decide how incompetence applies to equitable tolling of the AEDPA merits certiorari jurisdiction of this Court.

C. The Proceedings Below

Once being retained, counsel has pursued relief for Mr. Fisher in three separate actions based upon convictions within the jurisdictions of Seminole, Oklahoma and Sequoyah Counties in the State of Oklahoma. State post-conviction relief was sought in relation to Mr. Fisher's Sequoyah and Seminole County convictions.[1] Post-conviction relief was denied, and, thereafter, the Oklahoma Court of Criminal Appeals affirmed each denial on appeal. Regarding Mr. Fisher's Oklahoma County convictions, counsel elected to by-pass state procedure due to the "futility doctrine", given that Mr. Fisher's actions are very close or identical in nature and that relief had been denied by the state courts two times previously. (App. B at 11a-12a).

Subsequently, counsel filed three separate federal habeas corpus petitions, the first within the United States District Court for the Western District of Oklahoma, involving Mr. Fisher's Oklahoma County convictions and the second and third within the United States District Court for the Eastern District of Oklahoma, involving Mr. Fisher's Sequoyah and

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[1] The basis for post-conviction relief being that Mr. Fisher pled guilty while incompetent is in violation of substantive Due Process, U.S. Const. amends. 5 and 14.

Seminole County convictions. The central basis for each habeas corpus petition being that Mr. Fisher pled guilty while incompetent in violation of substantive Due Process, U.S. Const. amends. 5 and 14. Ultimately, each federal district court declined to equitably toll said habeas actions, dismissing them as time barred under the AEDPA's 28 U.S.C. § 2244 (d)(1)(A). Each district court also denied Mr. Fisher certificates of appealability. (App. B at 12a-14a).

On appeal, the United States Court of Appeals for the Tenth Circuit granted certificates of appealability and consolidated all three habeas actions. (App. B at 14a). Thereafter, the Court of Appeals affirmed the dismissal of Mr. Fisher's habeas corpus petitions, finding petitioner's guilty pleas as adequate and implicit findings of his competence and, as such, declining to equitably toll said actions due to Mr. Fisher's incompetency (App. B at 20a-21a), raising the question: Can a plea of guilty by a person who is "more likely than not incompetent" suffice as an adequate determination of that persons's competency and, affirmatively, as such, not even affording an evidentiary hearing as to the person's competency, because the guilty plea determination forecloses any vestige of equitable tolling. Herein lies the need to at least conduct an evidentiary hearing as to an individual's competence at the time of the guilty plea, prior to deciding whether to equitably toll the AEDPA's time bar due to alleged incompetence at the time of the plea.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among The Circuits Concerning Whether Equitable Tolling Of The AEDPA's Time Bar (28 U.S.C. § 2244 (d)(1)) Is Appropriate When A Habeas Petitioner May Be Incompetent.

The majority of the federal circuits have adhered to the doctrine of equitable tolling, but only in "rare and exceptional circumstances." *Smith v. McGinnis*, 208 F.3d 13, 17 (2nd Cir. 2000), cert. denied, 531 U.S. 840 (2000); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). "Equitable tolling will not be available in most cases, as extensions of time will only be granted if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. U.S. Dist. Court for Central Dist. of Cal.*, 128 F.3d 1283, 1288 (9th Cir. 1997). "The one-year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); "we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." *Miller v. New Jersey State Dept. Of Corrections*, 145 F.3d 616, 618 (3rd Cir. 1998). "We believe, therefore, that any resort to equity must be reserved for those rare instances where — due to circumstances external to the party's own conduct — it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir.

2000).

Counsel has sought equitable tolling of the AEDPA's one-year time limitations period, on behalf of Mr. Fisher. Counsel submits that Mr. Fisher's incompetence is an extraordinary circumstance, and, as such, Mr. Fisher is not culpable in failing to meet said limitations period prior to counsel's retainment. The only federal circuits to address the issue of competency effectuating equitable tolling in published opinions are the Ninth Circuit within *Calderon v. U.S. Dist. Court for Cent. Dist. of Cal. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998)(en banc), and within the Tenth Circuit in the instant case. The Tenth Circuit has found Mr. Fisher's circumstance to be unavailing. "In sum, Petitioner has failed to present extraordinary circumstances warranting equitable tolling. His mere allegations of incompetency at the time of his 1992 and 1994 pleas, all of which significantly pre-date this Circuit's April 24, 1997 grace period for pre-AEDPA convictions, do not suffice." (App. B at 20a).

The Tenth Circuit disregards *in toto* petitioner's competency history and lengthy factual "record disclosing a genuine basis for concern", including his initial adjudication of incompetence, subsequent unconstitutional jury trial verdict as "competent", as well as the multiple Applications for Determination of Competency, both before and after the state competency jury verdict in favor of a misapplication of this Court's precedent applicable to Mr. Fisher's guilty plea proceedings.[2] In contrast, the Ninth Circuit has held:

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[2] See Part III addressing the erroneous finding of the court of appeals that Mr. Fisher's guilty plea proceedings sufficed as adequate and implicit findings of his competence.

> "[A]lleged mental incompetency also justifies equitable tolling, at least until a reasonable period of time has elapsed after the district court makes a competency determination . . . **A putative habeas petitioner's mental incompetency — a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control** — renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations, and we reject Kelly III's holding to the contrary. When a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." *Calderon*, 163 F.3d at 541. (Emphasis added).

As such, had Mr. Fisher been within the jurisdiction of the Ninth Circuit rather than the Tenth Circuit, his habeas actions would have been equitably tolled due to his probable incompetence. Accordingly, the time is ripe for this Court to exercise its supervisory role over the federal judiciary resolving this discrepancy and, moreover, deciding the proper application of equitable tolling in the circumstance of a habeas

petitioner who "is more likely than not . . . incompetent." *Cooper v. Oklahoma*, 517 U.S. 348, 366-367 (1996).

II. The Question Presented Is Important

The Tenth Circuit's decisions does nothing to effectuate or remedy the *Cooper* violation imposed upon Mr. Fisher.

> "(T)he United States Supreme Court, on April 16, 1996, reversed an Oklahoma death penalty conviction, *see Cooper, supra n.2*, declaring that **the imposition of the burden of proof on a defendant to prove incompetence by clear and convincing evidence offended due process, necessarily impacting the legal effect of Judge Ricks' trial outcome in Oklahoma County, but not, as we observe hereafter, the resolution of this consolidated appeal**." (Emphasis added). (App. B at 10a-11a).

Therefore, while acknowledging that the constitutional violation occurred, the court yet afforded Mr. Fisher no relief.[3]

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[3] Mr. Fisher's circumstances are identical to that of *Cooper's* with regard to said competency jury trial, this Court reversed *Cooper's* convictions because "Oklahoma's clear and convincing evidence standard affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent. For the defendant, the consequences of an erroneous determination of competence are dire." *Cooper v. Oklahoma*, 517 U.S. at 364.

> "Whether the one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy "inadequate or ineffective" to test the legality of detention. *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 1229-30, 51 L.Ed.2d 411 (1977); *United States v. Hayman*, 342 U.S. 205, 223, 72 S.Ct. 263, 274, 96 L.Ed. 232 (1952). The burden is on the petitioner to demonstrate inadequacy and ineffectiveness. *See Bradshaw v. Story*, 86 F.3d 164, 167 (10th Cir. 1996)." *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998).

The decision of the Tenth Circuit, in and of itself, bares the burden of proving the habeas writ "inadequate and ineffective to test the legality of [petitioners] detention", as Mr. Fisher clearly has suffered a constitutional violation which materially affected and impacted his guilty pleas. Nevertheless, the AEDPA's time bar of 28 U.S.C. § 2244(d)(1)(A) has prevented the federal courts below from granting relief to Mr. Fisher by imposing procedural limitation period requirements on a legally incompetent person in an identical circumstance in which this Court granted relief in *Cooper*. Accordingly, affording no habeas relief to Mr. Fisher is a suspension of the writ in violation of U.S. Const. Art. I, § 9, cl.2.

Although *Cooper* did not address the AEDPA, it did address a procedural requirement upon the State of Oklahoma. Mr. Fisher submits the AEDPA is procedural in nature. This Court's mandate that constitutional protection for the rights of an incompetent individual to be tried only while competent

outweighs the State's important interest in the efficient operation of its criminal justice system should necessarily accord such constitutional protection prohibiting Congress from enacting a statute that effectively nullifies an individual's constitutional right to be tried only while competent. The federal government has no greater vested interest in the efficient operation of its criminal justice system than the State of Oklahoma. In *Cooper*, the individual rights of an incompetent person being convicted outweighed the State's interest. Mr. Fisher submits that his fundamental constitutional right to be tried only while competent outweighs the import of the procedural limitations statute imposed by the AEDPA. Mr. Fisher is "more likely than not incompetent" from the existing record, as well as actually and legally incompetent; therefore, any procedural default which bars Mr. Fisher from federal relief through no fault of his own renders the great writ ineffective and inadequate on its face.

To avoid the Suspension Clause violation, Mr. Fisher has sought equitable tolling of the AEDPA, to which 28 U.S.C. § 2244(d)(1)(D) would be applied relying upon this Court's precedent:

> "It is both taken for granted and yet profoundly sound that we must "construe a federal statute to avoid constitutional questions where such a construction is reasonably possible." *Arnett v. Kennedy*, 416 U.S. 134, 162, 94 S.Ct. 1633, 1648, 40 L.Ed.2d 15 (1974); *see also Cheek v. United States*, 498 U.S. 192, 203, 111 S.Ct. 604, 611, 112 L.Ed.2d 617 (1991); ("It is common ground that this Court, where possible, interprets congressional

enactments so as to avoid raising serious constitutional questions."); *Johnson v. Robison*, 415 U. S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974) (noting the "cardinal principle" that courts should construe a statute purporting to limit federal court jurisdiction in a potentially unconstitutional way to avoid the constitutional question whenever it is "fairly possible" to do so"). *Triestman v. U. S.*, 124 F.3d 361, 377 (2nd Cir. 1997).

Mr. Fisher asserts he has shown that the individual circumstances of his habeas actions mandate 28 U.S.C. § 2244(d)(1)(D); as such, Mr. Fisher's one (1) year time limitation period, as per 28 U.S.C. § 2244(d)(1), began upon the date his appellate counsel was retained to pursue his claims, i.e., July 17, 1997. (App. B at 17a and App. L at 99a). In contrast, the Tenth Circuit found that 28 U.S.C. § 2244(d)(1)(D) does not toll the limitations period, as such, raising serious constitutional due process questions with respect to the AEDPA; and whether such limitations are sufficiently protective of a person's fundamental constitutional right not to be tried while incompetent. Mr. Fisher asserts that from the record he was convicted while incompetent, *Cooper v. Oklahoma*, 517 U.S. 348, 364, 369 (1996); and that he has been incompetent to effectively raise this claim of incompetence at an earlier time. *Sena v. New Mexico State Prison*, 109 F.3d 652, 654 (10th Cir. 1997). Mr. Fisher's incompetence throughout the relevant period, i.e., prior to his pleas and up to the present, is further bolstered by the psychological report of Dr. Philip J. Murphy, Ph. D., Clinical Psychologist. (App. M at 101a-118a).

The fundamental questions raised here are fairly easy to state, yet remarkably difficult to resolve. While *Cooper* establishes that Mr. Fisher was "more likely than not incompetent" while tried and convicted, the AEDPA has barred Mr. Fisher's habeas corpus petitions pursuant to 28 U.S.C. § 2254. In such a case, does the federal judicial system afford any recourse to Mr. Fisher? Serious constitutional questions must arise if a person who can prove his incompetence on the existing record, and who could not have effectively raised his claim of incompetence at an earlier time, has no access to judicial review.

To this extent, Mr. Fisher has shown the lower courts that he is "entitled to some form of relief", as per *Walker v. Attorney General For State of Oklahoma*, 167 F.3d 1339, 1345 (10th Cir. 1999). Yet, the limitation period imposed by the AEDPA has precluded Mr. Fisher from relief.

With the foreclosure of federal relief to Mr. Fisher, 28 U.S.C. § 2241 through § 2254, as amended by the AEDPA, § 2244, are in violation of the Suspension Clause, U. S. Const. Art. 1, § 9, cl.2, the U. S. Constitution's prohibition on suspending the great writ.

> "We also find an open and significant due process question. The Supreme Court has stated that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353 (1992)." *Triestman v. U. S.*, 124 F.3d at 379; *see*

also Patterson v. New York, 432 U.S. 197, 201-202 (1977); *Cooper v. Oklahoma*, 517 U.S. at 367.

This Court held in *Cooper*, that procedural limitations are subject to proscription if they are not sufficiently protective of an individual's constitutional right to be tried only while competent. Unlike the actual innocence claim in *Triestman*: "It is certainly arguable, therefore, that the continued imprisonment of an actually innocent person would violate just such a fundamental principle." *Triestman*, F.3d at 379.

Mr. Fisher's claim of actual and legal incompetence has been deemed just such a principle. *Medina, supra.*

> "The deep roots and fundamental character of the defendant's right not to stand trial when it is more likely that not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection." — "While important state interests are unquestionably at stake, in these latter cases the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." *Cooper*, 517 U.S. at 367-368.

This Court in *Cooper* found that the procedural limitations enforced by the State of Oklahoma are subject to proscription, and indeed proscribed them. Counsel asserts the procedural limitations enforced by

the AEDPA are also subject to proscription in the extraordinary circumstance of petitioner.

Petitioner's primary contention is "that a constitutional violation has resulted in the conviction of one who is actually . . . . incompetent. . . *Cooper v. Oklahoma*, 517 U.S. 348, 352-56, 116 S.Ct. 1373, 1376-77, 134 L.Ed.2d 498 (1996)." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). Mr. Fisher's sole assertion is that from the record, Mr. Fisher is "more likely than not incompetent" as well as legally incompetent, and that Mr. Fisher's actual incompetence has rendered his ability to exercise due diligence beyond his control; in this respect, he must rely on competent counsel to exercise due diligence for him. Surely, this is an extraordinary circumstance over which Mr. Fisher had, nor has control; therefore, no fault should be cast upon him. Therefore, certiorari jurisdiction is warranted and justified in order to address this important constitutional question.

III. The Decision Of The Court Of Appeals Is Erroneous

In the aftermath of this Court's unanimous decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), holding unconstitutional the Oklahoma law requiring criminal defendants to prove incompetency to stand trial by clear and convincing evidence, the Tenth Circuit Court of Appeals has variously stated the bona fide doubt standard to obtain relief on said *Cooper* claim within: *Walker v. Gibson*, 228 F.3d 1217, 1227 (10th Cir. 2000); *Valdez v. Ward*, 219 F.3d 1222, 1240 (10th Cir. 2000); *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 567 (10th Cir. 2000); *Clayton v. Gibson*, 199 F.3d 1162, 1171 (10th Cir. 1999); *Wallace v. Ward*, 191 F.3d

1235, 1242 (10th Cir. 1999); *Barnett v. Hargett*, 174 F.3d 1128, 1135 (10th Cir. 1999); *Rogers v. Gibson*, 173 F.3d 1278, 1290 (10th Cir. 1999) and *Walker v. Attorney General for State of Oklahoma*, 167 F.3d 1339, 1345 (10th Cir. 1999). Ultimately, the appellate court resolved these variances through an en banc decision which enunciated:

> "{W}e hold that to prevail on a procedural competency claim after a trial in which a petitioner was found competent under an unconstitutional burden of proof, the petitioner must establish that a reasonable judge should have had a bona fide doubt as to his competence at the time of trial. We view the evidence in the record objectively, from the standpoint of a reasonable judge presiding over petitioner's case at the time of trial. A petitioner establishes a bona fide doubt if he shows that a reasonable judge should have doubted whether petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether petitioner had "a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. We stress that the due process requirement is continuing; a defendant must be competent throughout the entire trial. *See Drope*, 420 U.S. at 171-72, 181. To prevail on a procedural competency claim petitioner need not establish facts sufficient to show he was actually incompetent or to show he was

> incompetent by a preponderance of the evidence." *McGregor v. Gibson*, 248 F.3d 946, 954 (10th Cir. 2001) (en banc).

Counsel concurs the bona fide doubt standard is appropriate in the aforementioned decision of the appellate court given that none of these petitioners were adjudged to be incompetent at any time prior to trial.[4] The standard of a bona fide doubt was applied to Mr. Fisher by the district courts below, yet not mentioned in the decision affirming the district courts' orders of dismissal. Counsel submits that Mr. Fisher has unequivocally met the standard of a bona fide doubt; but, moreover, counsel asserts that the of a bona fide doubt standard has been inappropriately applied to petitioner. Mr. Fisher was adjudged to be incompetent prior to his unconstitutional competency jury trial, which is vastly different from the aforementioned cases where the petitioners failed to prove incompetence at any time prior to trial. Accordingly, Mr. Fisher is not similarly situated and, as such, the standard for relief should reflect the same. In essence, how can the Court apply the same standard to an individual who was actually adjudged incompetent and committed for treatment only to be found competent thereafter by an unconstitutional burden of proof per *Cooper*, while applying the same standard to individuals who were at no time prior to trial judicially deemed incompetent. Counsel strongly suggests the proper remedy when an

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[4] The exception being *Barnett v. Hargett*, 174 F.3d 1128 (10th Cir. 1999); Mr. Barnett's habeas corpus action afforded him relief through the right to counsel, intertwined with a procedural competency claim in a very unusual situation. *See Barnett*, 174 F.3d at 1136.

individual is adjudged to be incompetent, yet subsequently found to be competent through the application of an unconstitutional burden of proof during competency jury trial is the nullification and vacation of all proceedings thereafter. Simply stated, if not for the unconstitutional 'clear and convincing evidence' burden of proof employed during Mr. Fisher's competency jury trial, he would have remained adjudged incompetent. Moreover, said finding of competence suffered from constitutional infirmity. Thus any proceedings held thereafter are tainted with open and significant due process violations of both procedural and substantive nature as Mr. Fisher was and is incompetent.

At its most fundamental level, the Tenth Circuit erred in finding Mr. Fisher's guilty plea proceedings as adequate and implicit findings of his competence.[5] The Tenth Circuit has cited *United States v. Kelsey*, 15 F.3d 152, 153 (10th Cir. 1994), *McCarthy v. United States*, 394 U.S. 459, 466 (1969) and *United States v. Broce*, 488 U.S. 563, 570 (1989) in its discussion of guilty plea ramifications, noting, "and *sub silentio*, that he is legally competent, because competency is a necessary prerequisite to a valid plea." (App. B at 18a). As such, the Tenth Circuit has made the decision that when a person elects to plead guilty, he or she in essence stipulates to their competence given that "competency is a necessary prerequisite to a valid plea." Counsel submits that simply because a person pleads guilty

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[5] The Tenth Circuits reliance upon the guilty plea proceedings as a substitute for mandatory competency hearings as well as a *sub silentio* declaration of competence, is the foundation laid to support the decision to not toll the limitations period of the AEDPA.

does not mean he or she is, in fact, competent to do so. The aforementioned surmisen by the Tenth Circuit is completely erroneous on its face, and is contradicted by the very cases upon which it is premised. In proper context this Court found:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466; see also *Broce*, 488 U. S. at 570.

In addition, the Tenth Circuit's decision extracts a portion of *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

> "[A] guilty plea represents a break in the chain of events which has proceeded it in

> the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." (App. B at 18a). **In full, the paragraph reads to this conclusion:** "He may only attack the **voluntary and intelligent** character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Tollett*, 411 U.S. at 267. (Emphasis added).

Petitioner has met the above standards as it is incomprehensible for an incompetent person to voluntarily, knowingly and intelligently relinquish or abandon a known right or privilege. This premise is elaborated upon within *Pate v. Robinson*, 383 U.S. 375 (1966): "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. *See Taylor v. United States*, 282 F.2d 16, 23 (C.A. 8th Cir. 1960)." *Pate* at 384. The Court in *Cooper* went on to say,

> "Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." *Riggins v. Nevada*, 504 U.S., at 139, 112 S.Ct., at 1817 (KENNEDY, J., concurring in

judgment). After making the "profound" choice whether to plead guilty, *Godinez v. Moran*, 509 U.S. 389, 398, 113 S.Ct. 2680, 2686, 125 L.Ed.2d 321 (1993), the defendant who proceeds to trial "will ordinarily have to decide whether to waive his 'privilege against compulsory self-incrimination', *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his 'right to trial by jury,' ibid.; and, in consultation with counsel, he may have to decide whether to waive his 'right to confront [his] accusers,' ibid., by declining to cross-examine witnesses for the prosecution." *Ibid.* With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system"—the basic fairness of the trial itself." *Cooper*, 517 U.S. at 364.

The existing record proves Mr. Fisher was 'more likely than not incompetent' to plead guilty;[6] therefore

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[6] Mr. Fisher has "already demonstrated that he is more likely than not incompetent", given his previous adjudication of incompetency; subsequently, the only judicial proceeding finding Mr. Fisher competent prior to said guilty pleas was a competency

any guilty pleas could not have been of a knowing, intelligent and voluntary nature and, as such, should be invalid as they were obtained in violation of due process.

Moreover, counsel asserts Mr. Fisher is, by the adjudication of Judge Ricks, still legally incompetent. The Tenth Circuit has held en banc:

> "We have held repeatedly that when a criminal defendant's competency was determined under an unconstitutional burden of proof, the prior competency determination merits no presumption of correctness. *See, e.g., Walker v. Gibson*, 228 F.3d at 1227; *Van Woudenberg*, 211 F.3d at 567 n.5; *Clayton*, 199 F.3d at 1171; *Barnett*, 174 F.3d at 1135; *Walker v. Att'y. Gen.*, 167 F.3d at 1345. Under such circumstances, this Court will review the trial as if no competency hearing was held at all. *Van Woudenberg*, 211 F.3d at 567 n.5 ("Because the state trial court held [petitioner] to an unconstitutional standard for proving incompetency, its decision is not entitled to a presumption of correctness and it is as if no competency hearing was held at all." (citations

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jury trial, in which Mr. Fisher was unable to prove his incompetence by clear and convincing evidence, to which this Court found "The prohibition against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent. **Because Oklahoma's procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process.**" *Cooper*, 517 U.S. at 369. (Emphasis added).

omitted)); *see also Barnett*, 174 F.3d at 1135; *Walker v. Att'y. Gen.*, 167 F.3d at 1345." *McGregor v. Gibson*, 248 F.3d 946, 952-953 (10th Cir. 2001)(en banc).

In the above context per the Tenth Circuit's en banc decision, when looking in hindsight to Mr. Fisher's competency history, one can conclude only that Mr. Fisher was adjudged incompetent by Judge Ricks on November 18, 1991, and committed for treatment (App. I at 79a-80a); from that time to the present there have been no competency hearings or evidentiary hearings, absolutely nothing to judicially invalidate Judge Ricks' order of Mr. Fisher's incompetence,[7] in that no superseding or subsequent order found him competent via proper competency procedure.[8] "Where a judicial determination of incompetency has been made, that finding cannot be set aside absent a superseding judicial order. *See United States v. Fessel*, 531 F.2d 1275, 1277 n.4 (5th Cir. 1976)." *United States v. Clark*, 617 F.2d 180, 184 (9th Cir. 1980).

Mr. Fisher's competency history clearly shows to the present, no constitutional determination of his

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[7] The order to resume proceedings issued by Judge Ricks is constitutionally infirm, thus invalid, as it was based upon the jury verdict to which the unconstitutional standard of "clear and convincing evidence" was applied to Mr. Fisher. *Cooper*, 517 U.S. at 369. (App. J at 81a-82a).

[8] It is well settled that "if evidence exists which creates a genuine, reasonable doubt about the defendant's competence, the court must hold a hearing to resolve the doubt. *Pate v. Robinson*, 383 U.S. 375, 385 (1996)". *Sena v. New Mexico State Prison*, 109 F.3d 652, 655 (10th Cir. 1997). Mr. Fisher's adjudication of incompetency unequivocally manifests such doubt thereby mandating a hearing to resolve the competency issue.

competency has been held, rendering Judge Ricks' order of incompetence as the only constitutional adjudication of Mr. Fisher's competency.

> "As we explained *Supra* at 168, because Hull had been found incompetent to stand trial in 1975, he remained presumptively incompetent until the Commonwealth proved otherwise. The Commonwealth therefore, was precluded by due process from trying Hull on the pending murder charge until it obtained a judicial determination that Hull was competent to stand trial. *See Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-04, 43 L.Ed.2d 103 (1975) (the prohibition against subjecting to trial an incompetent defendant is "fundamental to an adversary system of justice"). If the district court in fact, has concluded that Hull received constitutionally ineffective assistance of counsel at the 1979 competency hearing, then the determination that Hull was competent to stand trial in 1979 retroactively becomes null and void. Once that determination is stricken, Hull retroactively reverts to his presumptively incompetent state, and his 1979 guilty plea thus becomes retroactively invalid as well. **Simply stated, the 1979 competency determination was an essential precondition to the guilty plea; hence, if the former has been declared constitutionally infirm, then the latter also must fall as the next**

domino in line." *Hull v. Freeman*, 932 F.2d 159, 169-70 n.8 (3rd Cir. 1991). (Emphasis added)

A fortiori the constitutionally infirm evidentiary standard used during petitioner's competency jury trial, per *Cooper*, renders Mr. Fisher's guilty pleas retroactively invalid as he retroactively reverted to his presumptively incompetent state.

In contrast, the Tenth Circuit suggests "trial judges would be required to hold mini-trials, should the issue of competency be raised, before accepting any guilty plea. We do not regard this as a necessary safeguard to ensure that a defendant is legally competent." (App. B at 20a). "In *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

Mr. Fisher submits his "mini-trial" [i.e., the unconstitutional competency jury trial] was mandatory as he was previously adjudged incompetent. Notwithstanding Oklahoma's statutory scheme,[9] if it were not for a competency hearing or trial how could Mr. Fisher's competence be "determined in the crucible of a full-blown evidentiary hearing at which [Mr. Fisher's] counsel could have subjected the report [of Eastern State Hospital, and specifically Dr. Jeanne Russell] to the test of cross-examination." *Sena v. New Mexico State Prison*, 109 F.3d 652, 655 (10th Cir. 1997). (App. B at

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[9] 22 Okl. St. Ann. § 1175.4.

6a-7a)

The Tenth Circuit, in its decision written by visiting New York U.S. District Judge Owen, has found it acceptable to disregard these constitutional safeguards to ensure Mr. Fisher was competent at the time of his guilty pleas by finding Mr. Fisher's counsel's affirmations and/or the trial court's sanitized observations at the time of the pleas sufficient to insure Mr. Fisher was in fact competent. Despite the Tenth Circuit's departure from this Court's precedent as well as its own, the necessity of holding an actual competency hearing has been negated, even though Mr. Fisher was an adjudged incompetent person. The fallacy of the Tenth Circuit's primary basis for denying relief can be demonstrated by addressing each guilty plea proceeding in turn.

Seminole County Guilty Plea

> "Four days later, August 26, back in Seminole County, his counsel filed an additional "Application for Determination of Competency," in which counsel stated that he was "[u]nable to conduct even the semblance of rational conversation with [Fisher]." In response, that same day, the Seminole court stayed its proceedings and set a hearing to commence two days later on August 28, 1992. However, the hearing was not held and on August 31, 1992, Fisher pleaded guilty in the Seminole proceeding." (App. B at 7a).

Additionally, to date no court has addressed the forced administration of Thorazine [300 mg daily] to Mr. Fisher only days prior to and throughout the guilty plea

proceedings; this issue was recited by the federal district court below, however never considered. (App. C at 25a and App. K at 86a-87a). Apparently, the Tenth Circuit's decision affirmed said omission without comment. Accordingly, three separate issues demonstrate glaring inconsistencies as to Mr. Fisher's declared competence.

1.) The Seminole Court stayed its proceedings and set a competency hearing 3 days prior to guilty plea, yet no hearing was held as the court relied on a verbal waiver of counsel during Mr. Fisher's guilty plea proceeding. (App. K at 87a-88a). This action of the Seminole Court conflicts with the dictates of *Pate* which establish "**[B]ut it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.**" *Pate*, 383 U.S. at 384. (Emphasis added).

2.) 300 mgs of Thorazine [by forced Thorazine administration] would have rendered Mr. Fisher completely unable to appreciate the magnitude of his pleas. *See Riggins v. Nevada*, 504 U.S. 127 (1992).

3.) The appellate court relies heavily upon defense counsel's affirmations of Mr. Fisher's competence; yet just 5 days before said guilty plea, defense "counsel were unable to conduct even the semblance of a rational conversation with [Fisher]". As such, any reassurances of counsel as to Mr. Fisher's competency are significantly undermined.

Sequoyah County Guilty Plea

"Nothing further transpired in the Oklahoma and Sequoyah County cases until the Sequoyah case was set for trial on January 20, 1994. There, Fisher's counsel, nine days before trial, moved for a psychological evaluation, expressing concern about his client's ability to assist in his defense and obtained a postponement . . . Then, sixteen days later, on February 7, 1994, Fisher, with counsel, pleaded guilty in the Sequoyah case arising from the attack on state troopers." (App. B at 8a-10a).

Neither his court appointed counsel nor the trial court followed up on the motion for psychological evaluation, and, for this reason, originally, this counsel filed as grounds for relief, ineffective assistance of counsel, as there was gross neglect of Mr. Fisher's rights, in that just 27 days prior to petitioner's guilty pleas the Sequoyah court appointed counsel had concerns about Mr. Fisher's ability to assist in his defense. With regard to any meaningful consideration of Mr. Fisher's ability to assist defense counsel or to prepare any defense there was none. The simple fact that Mr. Fisher pled guilty to maximum sentences to be served consecutively should indicate, in and of itself, Mr. Fisher had to be incompetent. Otherwise, for why or for what possible gain or incentive would he have had in choosing to plead guilty to maximum sentences to be served consecutively. Any defendant with even a rudimentary understanding of court procedure would have taken the case to trial, as obviously there could have been no worse outcome, and he or she would have

been entitled to an automatic direct appeal to the Oklahoma Court of Criminal Appeals.

Oklahoma County Guilty Plea

By the time of Mr. Fisher's guilty plea nearly two and one-half years from the date of his arrest, he had been appointed yet another counsel to assist in his defense, this being Mr. Fisher's fourth court appointed counsel. Obviously, this counsel simply went through the motions; he met with Mr. Fisher only two times, the first time for a few minutes in the jail and the second time at the guilty plea hearing. Herein lies the absolute fundamental need of the trial court to have previously determined Mr. Fisher's competence after the order of incompetence as discussed throughout this petition.

The aforementioned pleas taken in context and when reviewed in the "totality of the circumstances"[10] virtually scream out the need for an evidentiary hearing to assess Mr. Fisher's competency at the time of his pleas, notwithstanding his prior competency/incompetency adjudications. However, the Tenth Circuit found:

> "Nor do the three records support a claim that the judges and defense lawyers in each of Fisher's cases failed to address or fairly assess his competency at the time of the crimes or the plea, or otherwise failed

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[10] " We emphasize that assessment of a procedural competency claim requires us to form a judgment on the aggregate not the segment. We examine the totality of the circumstances: all evidence should be considered together, no single factor "stand[s] alone." *Drope*, 420 U.S. at 180 (quotation omitted)." *McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001) en banc.

in their respective obligations of ensuring that each of Fisher's pleas was voluntarily, knowingly and intelligently made." (App. B at 20a).

Mr. Fisher's actions disclose five (5) separate and distinct competency related motions filed, four (4) "Applications for Determination of Competency" and one (1) "Motion for Psychological Evaluation" by various defense counsel and/or judges, yet none of these applications or motions provided a competency hearing for Mr. Fisher, even though hearings were judicially ordered leaving only the unconstitutional competency jury trial as an adequate finding of competence. These circumstances show unequivocally the trial judges and defense lawyers did "fail to address or fairly assess" Mr. Fisher's competency, and as such failed in their respective obligations of ensuring that Mr. Fisher's pleas were voluntarily, knowingly and intelligently made. Accordingly the appellate court's decision reflects "clear error."

Mr. Fisher's actions show multiple competency hearings were ordered; yet in each case the trial judges neglected or ignored the mandatory constitutional safeguard of a full-blown competency hearing. These errors combined with the *Cooper* violation reflect a callous disregard for Mr. Fisher's constitutional right not to be tried while incompetent.

Certiorari jurisdiction is warranted to correct this egregious error and to clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-6457, 99-7107 and 00-7114

Filed, October 29, 2001

JOHN HADLEY FISHER,
Petitioner- Appellant,

V.

GARY L. GIBSON;
DREW EDMONDSON,
Attorney General of the
State of Oklahoma,
Respondents - Appellees.

Before SEYMOUR and PORFILIO, Circuit Judges, and OWEN*, District Judge.

* The Honorable Richard Owen, United States District Judge, United States District Court for the Southern District of New York, sitting by designation.

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-6457, 99-7107 & 00-7114

Filed, August 22, 2001

JOHN HADLEY FISHER, *Petitioner-Appellant,*

v.

GARY GIBSON, Warden; DREW EDMONDSON, Attorney General of the State of Oklahoma, *Respondents-Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF OKLAHOMA.
(D.C. Nos. CIV-98-965-T, CIV-98-593-BU, CIV-99-132-BU)
D.C. Judge Ralph G. Thompson
D.C. Judge Michael Burrage

JUDGES:
Before SEYMOUR, PORFILIO, Circuit Judges, and OWEN, District Judge. *

* The Honorable Richard Owen, United States District Judge, United States District Court for the Southern District of New York, sitting by designation.

OPINION

OWEN, District Judge.

John Hadley Fisher, Petitioner-Appellant, currently serving life sentences without parole at the Oklahoma State Penitentiary, appeals the denial of federal habeas relief, *see* 28 U.S.C. § 2254, from convictions on unappealed guilty pleas in 1992 and 1994 in three separate Oklahoma State proceedings in Oklahoma County, Seminole County and Sequoyah County, which were the subject of three different federal habeas petitions and three separate appeals to this Court now consolidated for review. We affirm.

The principal issue on these consolidated appeals is whether each of the federal district courts that heard Fisher's habeas petitions alleging incompetence at the time of each of his three state court pleas should have granted a hearing on that subject and, subsequently, applied equitable tolling to the one year limitation period for filing of federal habeas relief which had expired in each case. *See* 28 U.S.C. § 2244(d).

Fisher, a highly troubled and occasionally violent youth and teenager, on September 20, 1991, at age nineteen, was charged with murder and conspiracy in Seminole County and faced the death penalty. He retained counsel. The next day, September 21, 1991, in

Oklahoma County, a multi-count felony information involving different events charged Fisher and four others with conspiracy, burglary, kidnapping for purpose of extortion and robbery. The court appointed Fisher counsel. A month later, in Oklahoma County, Fisher's counsel expressed concern as to his client's competence and, on October 21, 1991, Oklahoma County District Judge Carolyn R. Ricks stayed the proceeding pending a psychological examination.[1]

On November 18, 1991, Judge Ricks held a hearing which included evidence from forensic psychologist Dr. Kelly Shannon that Fisher was of "average intelligence" with a high school diploma, but his "[a]ffect was depressed and apathetic." Shannon concluded, "As Mr. Fisher appears to have a psychotic underpinning producing grandiose, delusional beliefs, it is felt he can not assist with counsel at this time. It is recommended he be remanded to Eastern State Hospital for restoration of competency." Judge Ricks found Fisher "incompetent" on November 18, 1991, committed him to Eastern State Hospital in Vinita, Oklahoma, and suspended further proceedings in Oklahoma County until Fisher's competency could be restored.

In Seminole County, three days later, November 21, 1991, Fisher's counsel, based on the proceeding in Oklahoma County, expressed similar doubts to the trial

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[1] *See* OKLA. STAT. tit. 22, § 1175.2(c) ("Any criminal proceedings against a person whose competency is in question shall be suspended pending the determination of the competency of the person.").

court about Fisher's competence. The Seminole Court thereupon undertook to hold its own competency hearing, notwithstanding Fisher's counsel contended that Seminole County was bound by Oklahoma County's determination that Fisher's competency was in question. Before this could be resolved, however, on January 31, 1992, the Oklahoma Court of Criminal Appeals intervened entering an "Order Granting Writ of Prohibition," which prohibited the Seminole County Court from conducting a competency hearing, and stating that all criminal procedures were stayed until Fisher "achieves competency."

On February 25, 1992, Eastern State Hospital, in an extensive report of Dr. Jeanne Russell, the hospital's Director of Forensic Programs, concluded that Fisher, age nineteen with an above average IQ, understood that "he was charged with serious felony offenses," was facing the death penalty, understood the basic roles of judge and jury, the plea options available and potential defenses to the charges against him and, specifically, "In evaluating competency functions, Mr. Fisher appears to have a factual understanding of the charges, as well as an ability to communicate and cooperate with defense counsel." Accordingly, Fisher was discharged from the hospital and returned to Oklahoma County for further proceedings. While there, he twice attempted suicide.

In addition to the foregoing hospitalization, study and discharge as competent, on May 18 and 19, 1992, Judge Ricks, on Fisher's application, conducted a competency trial with a jury. The trial court's charge, in accordance with Oklahoma law at that time, put the

burden on Fisher to prove his incompetence by clear and convincing evidence.[2] In answer to the specific question: *Is the petitioner incompetent to undergo further criminal proceedings at this time?*, the jury answered, *no.* The jury, as Judge Ricks' order relates, having found Fisher "competent," or, we note, more precisely, that he had not proven incompetence by clear and convincing evidence, criminal proceedings were resumed in Oklahoma County on May 19, 1992.

Sometime in the next weeks, Fisher was transferred to Seminole County where that proceeding also resumed, but on or about August 19, 1992, Fisher escaped from the Seminole County jail. He was, however, shortly recaptured in Sequoyah County, and on August 22, was charged with two others in a Sequoyah County indictment with an attack on state troopers while trying to run a Sequoyah roadblock, and was appointed counsel.

Four days later, August 26, back in Seminole County, his counsel filed an additional "Application for Determination of Competency," in which counsel stated that he was "[u]nable to conduct even the semblance of rational conversation with [Fisher]." In response, that same day, the Seminole court stayed its proceedings and set a hearing to commence two days later on August 28, 1992. However, the hearing was not held and on August 31, 1992, Fisher pleaded guilty in the Seminole

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[2] We address the later-determined error of this more specifically hereafter. *See Cooper v. Oklahoma, 517 U.S. 348, 350, 369, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).*

proceeding. There, the trial court in an "Order Denying Post-Conviction Relief," stated:

> There is no record of a hearing or disposition of the application on August 28, however, on August 31, 1992 the defendant with counsel, together with the District Attorney presented themselves before the Court for purpose of entering a negotiated plea on the 1st Degree murder charge and a blind plea to the conspiracy charge. During the course of that plea the court observed the defendant, made inquiry of defendant's counsel concerning their request for a competency determination, reviewed the defendant's statement of facts in support of the plea of guilty, and based upon all of the observations, inquiry, and representation of counsel determined the defendant competent to enter his plea of guilty to the charge. The only allegations presented in the course of this case raising a question of defendant's competence were the allegations contained in the defendant's application for a determination of competency.

Fisher was sentenced to life imprisonment without the possibility of parole. He took no direct appeal and has at no time sought to withdraw his plea.

Nothing further transpired in the Oklahoma and

Sequoyah County cases until the Sequoyah case was set for trial on January 20, 1994. There, Fisher's counsel, nine days before trial, moved for a psychological evaluation, expressing concern about his client's ability to assist in his defense and obtained a postponement. Then on January 21, 1994, the day after the Sequoyah trial was to begin, Fisher, in Oklahoma County, with counsel present (and, we note, *not* having moved for a psychological evaluation), pleaded guilty. The trial court's "Plea of Guilty, Summary of Facts" sheet, an extensively detailed questionnaire of the defendant *and* his lawyer requiring the defendant to initial twenty-nine inquiries and the lawyer to initial three others (including two specific questions about competency), indicates Fisher and his counsel answered "No" to the final question: "Do you or your lawyer have anything more to say or do you know of any legal reason why you should not be sentenced now?" On the basis of the foregoing, the trial court, the prosecutor and the defense attorney subscribed to the summary statement in the form:

> The Defendant is mentally competent to understand the nature, purpose and consequences of this proceeding, and further, Defendant was mentally competent to appreciate and understand the acts he . . . committed on or about the date alleged in the Information, and to realize the nature, purpose and consequences of those acts at the time they were committed.

Under a plea agreement, Fisher essentially received a life

sentence to be served concurrently with the life sentence without parole he was by then already serving from his previous Seminole plea in 1992. Here, too, Fisher took no direct appeal, did not seek to withdraw his plea or file for any post-conviction relief.

Then, sixteen days later, on February 7, 1994, Fisher, with counsel, pleaded guilty in the Sequoyah case arising from the attack on state troopers. The Sequoyah court's allocution minutes summarily recite:

> The Defendant is mentally competent to appreciate and understand the acts he committed on or about the date alleged in the information and to realize the nature, purpose and consequences of these acts at the time they were committed. The Court further finds the plea entered herein has been knowingly and voluntarily entered with full knowledge of those Constitutional rights as explained.

Fisher was there sentenced to four consecutive sentences totaling fifty years which were ordered to run concurrently with his Seminole County life sentence. Here again, Fisher took no direct appeal and never sought to withdraw his plea.

During the next three-and-one-half years, while Fisher was serving his sentences, the United States Supreme Court, on April 16, 1996, reversed an Oklahoma death penalty conviction, *see Cooper, supra* n.2, declaring that the imposition of the burden of proof

on a defendant to prove incompetence by clear and convincing evidence offended due process, necessarily impacting the legal effect of Judge Ricks' trial outcome in Oklahoma County, but not, as we observe hereafter, the resolution of this consolidated appeal.

Coming to July 17, 1997, Fisher's mother retained attorney John K. Bounds, who thereafter has served as Fisher's counsel both below and on these appeals. Shortly, there were motions for post-conviction relief in Sequoyah County on August 13, 1997 and in Seminole County on October 16, 1997.[3] The Sequoyah court denied Fisher's motion on November 21, 1997, rejecting the argument that Fisher pleaded guilty while incompetent based on its reading of the record which included the court's inquiry of Fisher and his lawyer regarding Petitioner's competence at the time of the plea. This was affirmed by the Oklahoma Court of Criminal Appeals on February 13, 1998. Next, on April 9, 1998, the Seminole court denied Fisher's application there for post-conviction relief, similarly rejecting the notion that Fisher pleaded guilty while incompetent based on its findings that the trial court observed Petitioner's demeanor and inquired of Fisher and his counsel regarding his competence. Further, the Seminole court held that Fisher had constructively withdrawn his application for a determination of competency by entering his guilty plea. The Oklahoma Court of Criminal Appeals affirmed this denial on June 29, 1998.

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[3] The Oklahoma County conviction was not attacked until a year later in federal court as discussed hereafter.

Thereafter, on July 15, 1998, Fisher filed a federal habeas petition in the United States District Court for the Western District of Oklahoma claiming that as to the Oklahoma County plea, he was incompetent when he pleaded guilty. The State of Oklahoma moved to dismiss Fisher's petition as time-barred.[4] The assigned Magistrate eventually filed a Supplemental Report and Recommendation stating that Fisher's July 1998 petition should be dismissed as untimely under the one-year limitation period contained in 28 U.S.C. § 2244, enacted under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 124, which one-year period, as observed hereafter, had expired on April 24, 1997. On November 22, 1999, the District Court (Ralph G. Thompson, *Judge*) adopted this recommendation, dismissed the petition and denied Fisher a certificate of appealability.

In the meantime, on December 21, 1998, Fisher filed a second federal habeas petition in the United States District Court for the Eastern District of Oklahoma (Michael Burrage, *Judge*), and an amended petition on January 11, 1999, asserting among other grounds for relief from his Sequoyah conviction that the trial court, Fisher having raised a question as to his competency, failed to hold a hearing and that his appointed counsel failed to investigate his mental health history or pursue certain psychiatric defenses. The State

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[4] The Magistrate to whom the case was referred at first recommended that Fisher's petition be dismissed for failure to exhaust state remedies in the District Court of Oklahoma.

of Oklahoma moved to dismiss the petition as untimely under the said one-year limitations period imposed by AEDPA. It was in this 1999 federal habeas proceeding that Fisher first advanced the theory that because Oklahoma County Judge Ricks found him incompetent in 1991, and while he was subsequently found "competent" in 1992 by a jury, it was under a later-determined unconstitutional standard, *see Cooper, supra* n.2, and, that being so, Judge Ricks' previous 1991 finding of incompetence controlled because no constitutionally proper competency proceeding has ever been held.[5] As a result, Fisher contended, his petition was not time-barred because the limitations period was equitably tolled. Fisher argued that his limitations period commenced when his mother retained Bounds as counsel in July 1997. The District Court denied the petition, ruling that AEDPA's one-year limitations period should not be tolled because each of Fisher's claims regarding his competence were discoverable at the time of each of his three guilty pleas. The District Court denied a certificate of appealability, concluding that Petitioner failed to make "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2).

Next, on March 24, 1999, Fisher filed a third

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[5] It was not argued or addressed by counsel, as we later discuss in more detail, that after Judge Ricks found Fisher incompetent and committed him to Eastern State Hospital, he was within two months discharged as competent in a lengthy report by the hospital and, more importantly, that Judge Ricks lifted the stay, *see* OKLA. STAT. tit. 22, § 1175.2(c), and continued the criminal case on that finding.

federal habeas petition in the United States District Court for the Eastern District of Oklahoma (Michael Burrage, *Judge*) seeking relief from his Seminole County murder and conspiracy convictions. Here, too, he asserted that the state trial court's failure to hold a hearing before accepting his guilty plea violated the due process clause and, again, that he had pleaded guilty while incompetent, and as to this issue, sought an evidentiary hearing on his habeas claim. Judge Burrage denied both Fisher's motion for a hearing and his petition, again noting that Petitioner had not developed facts warranting equitable tolling of AEDPA's one-year statute of limitations which, as elsewhere observed, had run almost two years earlier on April 24, 1997. The District Court denied a certificate of appealability.

On Petitioner's motions, this Court granted certificates of appealability in all three matters in June 2000 and February 2001. Our jurisdiction arises under *28 U.S.C. § 2253*. We review the factual findings of the district courts for clear error and their legal bases for dismissal of Fisher's petitions *de novo*. *See Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998).

Fisher raises essentially three points in these consolidated appeals: the federal district courts erred in (1) failing to hold evidentiary hearings regarding Petitioner's competence at the time he pleaded guilty in the state courts, (2) dismissing his federal petitions as untimely because he was entitled to equitable tolling for his incompetence, and, alternatively, (3) even if this Court should affirm the findings of untimeliness, AEDPA's one-year limitation on the filing of a federal

habeas petition violates, under these circumstances, the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended . . . .").

Fisher's petitions, filed in 1998 and 1999, are governed by the provisions of AEDPA, including "[a] 1 year period of limitation" in an "[a]pplication for a writ of habeas corpus by person in custody pursuant to the judgment of state court." 28 U.S.C. § 2244(d)(1). The limitations period generally runs from the date on which the state judgment became final after direct appeal, *see* 28 U.S.C. § 2244 (d)(1)(a), but is tolled during the time state post-conviction review is pending, *see* 28 U.S.C. § 2244(d)(2).

Each of Fisher's three convictions was not, however, appealed and therefore became final ten days after entry of Judgment and Sentence, *see* OKLA. STAT. tit. 22, § 1051; Rule 4.2, *Rules of the Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App., all of which occurred more than two years before AEDPA's effective date. Where a conviction became final before AEDPA took effect, as is the case with Fisher, the one year limitation period for a federal habeas petition starts on AEDPA's effective date, April 24, 1996. *See Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000); *Hoggro v. Boone*, 150 F.3d 1223, 1225-26 (10th Cir. 1996). Thus, in order to be timely, Fisher should have filed all of his habeas petitions prior to April 24, 1997. *See United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997). Fisher's petitions cannot be tolled for time spent in state post-conviction proceedings because his applications

for post-conviction relief were not filed until after April 24, 1997, the end of the limitations period for convictions, like Fisher's, which became final before the effective date of AEDPA.

Given the foregoing, Fisher's petitions can only be deemed timely if equitable tolling were, for some reason, to be applied, that is, a judicially-crafted stopping of the clock. "AEDPA's one-year statute of limitations is subject to equitable tolling but only in 'rare and exceptional circumstances.'" *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (internal citation omitted); *see also Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (holding equitable tolling appropriate only where failure to timely file caused by "extraordinary circumstances"), *cert. denied*, 149 L. Ed. 2d 110, 121 S. Ct. 1195 (2001); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.), *cert. denied*, 531 U.S. 840, 148 L. Ed. 2d 63, 121 S. Ct. 104 (2000); *Calderon v. United States Dist. Court for Cent. Dist. of Cal. (Kelly)*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). "The one-year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy, but requires inmates to diligently pursue claims." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

Fisher's present counsel, Mr. Bounds, argues that the limitation period should be tolled because Fisher

was, and always has been, incompetent and therefore unable to seek relief until Bounds was retained by Fisher's mother, at which time, for the first time, someone of competence stepped in to recognize and deal with the myriad legal issues. Thus while almost three months after this Circuit's April 24, 1997 AEDPA one-year grace period for convictions which became final before the law's enactment had expired, over three years after his convictions became final in the Oklahoma County and Sequoyah County proceedings and almost five years since his conviction became final in Seminole County, Bounds asserts that the proper chronological starting point for the one year within which Fisher's habeas petition would be timely is July 17, 1997, the date he was retained by Fisher's mother, for this is the date, "[o]n which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). For § 2244(d)(1)(D) to be applicable, the federal district courts below would have had to have equitably tolled the period from the date on which Fisher's convictions became final to July 1997, the date, as observed, Bounds was retained.

Fisher's keystone contention above, that the state trial courts erred by failing to conduct an evidentiary hearing prior to accepting each of his three guilty pleas, requires us to address what this multi-faceted record reveals as to Fisher's competence in the three separate Oklahoma proceedings, as determined by the reviewing federal district judges below.

Normally, a defendant concedes criminal liability

as to each element of the charged crime by entering a plea of guilty, *see United States v. Kelsey*, 15 F.3d 152, 153 (10th Cir. 1994); *see also McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *United States v. Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989), and, *sub silentio*, that he is legally competent, because competency is a necessary prerequisite to a valid plea. A defendant, moreover, generally waives all objections of a constitutional nature when he voluntarily and knowingly enters a plea of guilty, *see Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973), because

> [a] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Id. at 267.

A lawyer for a defendant, charged with ethical obligations, is also to be relied on in some measure in assessing the validity of a plea for "[d]efense counsel is often in the best position to determine whether a defendant's competency is questionable." *Walker v. Gibson*, 228 F.3d 1217, 1228 (10th Cir. 2000) (internal

citations omitted), *cert. denied*, 150 L. Ed. 2d 725, 121 S. Ct. 2560 (2001). In Fisher's three plea proceedings, each lawyer represented to each judge at the time of the plea that Fisher was competent.[6] In each case as well, the state trial judges made their own observations of Fisher's competence to enter his pleas of guilty, although obviously based on less input and less close association than counsel.

On the record before us, therefore, Petitioner has given us (and the federal district judges reviewing his claims) no basis to disregard these consistent indicia of competency. Fisher argues that because his Oklahoma County competency trial saddled him with a later-determined unconstitutional burden of establishing competency, no court to date has ever held a constitutionally compliant competency proceeding. We do note, however, that the jury determination of competence did immediately follow Fisher's discharge from Eastern State Hospital after the hospital's doctors made findings and released him to the state trial court as competent. Further, just because that proceeding with a finding of competence suffered from constitutional infirmity does not mean that all subsequent proceedings thereafter were tainted or rendered unreliable as to the conclusions to be drawn from them as to Fisher's competence at their relevant

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[6] For example, in Oklahoma County, Fisher's counsel initialed a sheet entitled "Plea of Guilty, Summary of Facts." The sheet indicates that counsel was asked if he had reason to believe that Fisher was incompetent at the time of the plea or when he committed the crimes detailed in the information to which he was pleading guilty. Counsel answered "no" to both inquiries.

times. Petitioner does not reference any constitutional infirmity in the three later plea proceedings themselves and only recites his constitutional right not to be convicted while incompetent. The only argument Fisher's counsel advances as to why the findings of competence by the trial judges and the representations of defense counsel at the plea proceedings were insufficient is that plea proceedings are somehow different, that is, they are too short and simple to make important determinations about legally significant issues such as mental competence. This argument is unpersuasive. Shorter though they may be, were we to accept this position, trial judges would be required to hold mini-trials, should the issue of competency be raised, before accepting any guilty plea. We do not regard this as a necessary safeguard to ensure that a defendant is legally competent.

Nor do the three records support a claim that the judges and defense lawyers in each of Fisher's cases failed to address or fairly assess his competency at the time of the crimes or the plea, or otherwise failed in their respective obligations of ensuring that each of Fisher's pleas was voluntarily, knowingly and intelligently made. In sum, Petitioner has failed to present extraordinary circumstances warranting equitable tolling. His mere allegations of incompetency at the time of his 1992 and 1994 pleas, all of which significantly pre-date this Circuit's April 24, 1997 grace period for pre-AEDPA

convictions, do not suffice.[7] The federal district courts' decisions relying on these findings and declining to equitably toll Fisher's petitions were therefore appropriate. Similarly, the Eastern and Western District Courts' decisions dismissing Fisher's habeas petitions also examined the records and concluded that there was no evidence of incompetence at the time of the crimes or the pleas and, on that basis, declined to hold evidentiary hearings on those issues. Since 28 U.S.C. § 2244 does not require a hearing on the issue of time-bar or equitable tolling, an evidentiary hearing would be a matter of discretion. Accordingly, we conclude that the three district courts did not abuse their discretion by denying Petitioner's requests for evidentiary hearings.

Finally, Fisher contends that AEDPA's one-year limitation on the filing of a federal habeas petition, under these circumstances, violates the Suspension Clause. We addressed this issue in *Miller*, 141 F.3d at 976-978, where we noted that "[w]hether the one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy 'inadequate or ineffective' to test the legality of detention." *Id.* at 977 (quoting *Swain v.*

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[7] We note that a panel of this Court reached the same conclusion regarding similar issues in an unpublished Order and Judgment. *See Jackson v. Hargett*, 1999 U.S. App. LEXIS 16984, No. 98-6419, 1999 WL 527720, at *2 (10th Cir. July 23, 1999) (holding that "an allegation of incompetency at the time of [Petitioner's] state court conviction, almost eleven years prior to filing his federal habeas petition, does not suffice . . ." to warrant equitable tolling). Jackson is not binding precedent and we do not rely on it in reaching our decision in the present appeal. *See* 10th Cir. R. 36.3. We cite that Order and Judgment simply to acknowledge that the issues recur.

Pressley, 430 U.S. 372, 381, 97 S. Ct. 1224, 1229-30, 51 L. Ed. 2d 411 (1977)). Fisher bears the burden of demonstrating inadequacy and ineffectiveness. *See id.* Although there may be circumstances which render the habeas remedy inadequate and ineffective, on the basis of the extensive recitals above, we are satisfied that such circumstances are not present here.

Finally, we observe that Fisher does not contend his claimed due process violations have resulted in the erroneous conviction of an innocent man. *See Miller, 141 F.3d at 978* (citing *Schlup v. Delo,* 513 U.S. 298, 323-329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

On the records presented to the district courts, we conclude that the circumstances set forth in Fisher's petitions in no way reach the required extraordinariness as to warrant equitable tolling, and we therefore hold that none of the district courts below erred in declining to hold evidentiary hearings and dismissing Fisher's petitions as untimely. Accordingly, the judgments of each of the three district courts on this consolidated appeal is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV 99-132-B

Filed, September 27, 2000

JOHN HADLEY FISHER,)
Petitioner,)
)
v.)
)
GARY GIBSON, Warden,)
Respondent.)
)

ORDER

This matter is before the court on respondent's Motion to Dismiss Time Barred Petition for a Writ of Habeas Corpus [Docket #7], petitioner's Motion for Evidentiary Hearing [Docket # 15], and petitioner's Motion to Amend Petition for Writ of Habeas Corpus [Docket #22]. Petitioner, an inmate currently incarcerated at Oklahoma State Penitentiary in McAlester, Oklahoma, attacks his convictions and sentences in Seminole County, Oklahoma, District Court Case Number CRF-91-274 for Conspiracy to Commit a Felony (Count 1) and Murder in the First Degree (Count 2) on the following grounds:

I. The failure of the trial court to hold a hearing on petitioner's most recent application for determination of competency as ordered by another judge of the district court left legitimate doubt as to petitioners [sic] mental competency; petitioner was further prejudiced by the trial courts [sic] resumption of proceedings, whereas no determination of petitioner [sic] competency was made as mandated by the legislature.

II. The finding of the district court that petitioner constructively withdraw [sic] his application for determination of competency by foregoing a hearing and specifically withdrawing said application during the process of the plea is in error, in that it presupposes petitioner was competent to do so; the trial courts [sic] acceptance of said waiver deprived petitioner of procedural due process with regard to a mandatory competency hearing, and substantive due process in allowing petitioner to waive his constitutionally protected rights while entering said guilty plea as petitioner was incompetent to do so, in violation of the

Fourteenth Amendment of the United States Constitution.

III. The forced administration of Thorazine to petitioner prior to and throughout guilty plea proceedings further prejudiced petitioner to an inability to rationally function, or to understand the magnitude or consequences of the proceedings held against him in deprivation of due process of law and in violation of the Fourteenth Amendment.

IV. The conviction of petitioner while legally incompetent is violative of substantive due process as accorded by the Fourteenth Amendment of the United States Constitution.

V. Petitioner has raised sufficient doubt as to his competency during guilty plea, entitling petitioner to a [sic] evidentiary hearing for the purpose of showing that he was incompetent during said guilty plea in accordance with 28 U.S.C. § 2254(e)(2).

Petitioner's Motion to Amend Petition for Writ of Habeas Corpus

On June 2, 2000, the court directed petitioner's counsel to show cause why this action should not be dismissed for lack of jurisdiction [Docket # 18], because counsel had alleged petitioner's mother--not petitioner--had engaged counsel to represent him in habeas matters. In response to the court's order [Docket #21], petitioner's counsel asserted that while this habeas action was prompted by petitioner's mother, it was executed by petitioner via his counsel. Petitioner's counsel contends petitioner is aware that legal action is being pursued in an attempt to gain his release from prison and that counsel is representing petitioner in this action. However, counsel asserts petitioner is "exceptionally nonchalant" and will not discuss the matter with counsel. Counsel claims petitioner's behavior is "obviously motivated by delusional thinking," based on a psychological evaluation performed on September 29, 1999. Counsel also has submitted a handwritten affidavit by petitioner which was executed on June 26, 2000:

> Dear Judge,
>
> i am at a loss of why i need to write you, as we both know you are unable to free me, i've no doubt you are aware of who i am, therefore, this is silly, even so i agreed to let Mr. Bounds trifle with the law. he is often interesting to talk with, any how i accept him as my attorney,

perhaps she feels better.

John Fisher

After careful review, the court finds petitioner does have individual standing to pursue this action, and it would not be appropriate to allow petitioner's relatives to pursue his claims as his "next friend," as proposed in petitioner's Motion to Amend Petition for Writ of Habeas Corpus [Docket #22] and the proposed amended petition. Petitioner's counsel admits petitioner recognizes counsel as representing him in this action and that counsel is attempting to secure petitioner's release, although petitioner is not interesting in assisting counsel. Therefore, petitioner's Motion to Amend Petition for Writ of Habeas Corpus is OVERRULED. *See Whitmore v. Arkansas,* 495 U.S. 149, 162-65 (1990).

Motion for Evidentiary Hearing

Petitioner has filed a Motion for Evidentiary Hearing [Docket #15] to determine his competency at the time of his plea and conviction and during the time he contends the applicable statute of limitations should be tolled.

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant nows that--

(A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). *See also Miller v. Champion,* 141 F.3d 1249, 1253 (10th Cir. 1998).

Because this matter may be resolved on the basis of the record and the law, and, as discussed below, petitioner has failed to show a justifiable reason for his failure to develop the factual bases of his claims in state court, this court finds an evidentiary hearing is not warranted. *See Townsend v. Sain,* 372 U.S. 293, 312 (1963), *overruled in part by Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992).

Respondent's Motion to Dismiss Time Barred Petition

Respondent has filed a Motion to Dismiss Time Barred Petition [Docket #7], alleging the petition was

filed beyond the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(d) ("AEDPA").

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise

of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The record indicates that on August 31, 1992, pursuant to pleas of guilty, a Judgment and Sentence was entered in CRF-91-274 against petitioner for Conspiracy to Commit a Felony and Murder in the First Degree. Petitioner did not seek to timely withdraw his guilty plea or seek a direct appeal to the Oklahoma Court of Criminal Appeals. Petitioner's conviction, therefore, became final on September 10, 1992, ten days after entry of the Judgment and Sentence. *See* Okla. Stat. tit. 22, § 1051; Rule 4.2, *Rules of the Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. On October 16, 1997, petitioner filed an amended application for post-conviction relief in the Seminole County District Court, raising the issue of petitioner's competency to enter his guilty pleas.[1] The amended application was denied on the merits on April 9, 1998, in *State v. Fisher*, No. CRF-91-274 (Seminole County Dist. Ct. Apr. 9, 1998). The Oklahoma Court of Criminal Appeals affirmed, finding the competency claim was

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[1] It is unclear from the record whether an original post-conviction application was filed.

procedurally barred. *See Fisher v. State,* No. PC 98-544 (Okla. Crim. App. June 29, 1998).

The Tenth Circuit Court of Appeals has held that a petitioner whose conviction became final on or before April 24, 1996, must file his petition for a writ of habeas corpus before April 24, 1997. *See Miller v. Mart,* 141 F.3d 976,977 (10th Cir. 1998), *cert. denied,* 525 U.S. 891 (1998); *see also United States v. Simmonds,* 111 F.3d 737, 746 (10th Cir. 1997). Under this analysis, petitioner's one-year limitation period began to run on April 24, 1996, the effective date of AEDPA. The court is required to toll time spent in properly filed state post-conviction litigation, *see Hoggro v. Boone,* 150 F.3d 1223, 1226-27 (10th Cir. 1998), but petitioner's post-conviction proceedings did not begin until after expiration of the limitation period. Therefore, no additional tolling is permitted for the post-conviction period. *See Rashid v. Khulmann,* 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid the statute of limitations.")

Petitioner alleges that, pursuant to 28 U.S.C. §2244(d)(1)(D), he is within the limitations period. He claims he was diagnosed as a paranoid schizophrenic prior to his plea and conviction, and contends, without citing authority, that the statute of limitations should commence on or about July 17, 1997, the date counsel was engaged to challenge his convictions. Petitioner also claims the time spent in post-conviction proceedings from October 16, 1997, to June 29, 1998, should toll the limitations period. He calculates he had until March

30, 1999, to file this petition which was filed on March 24, 1999.

According to petitioner, he was charged with Conspiracy to Commit Murder and Murder in the First Degree in Seminole County District Court Case Number CRF-91-274 on September 20, 1991. The following day he was charged in a multi-county felony information filed in Oklahoma County, Oklahoma, District Court Case Number CF-91-5078. Petitioner was incarcerated in the Seminole County Jail.

On October 20, 1991, prior to the preliminary hearings on the two cases, petitioner's counsel in the Oklahoma County case filed an application to determine petitioner's competency. The Oklahoma County District Court held a hearing on the application and found there was doubt as to petitioner's competency. The Oklahoma County proceedings were stayed, and petitioner was ordered to undergo an examination to determine his competency. The psychiatrist who evaluated petitioner concluded that petitioner was not competent, and following the November 18, 1991, post-examination competency hearing, the Oklahoma County District Court found petitioner was incompetent. Petitioner was committed to Eastern State Hospital for observation and treatment until his competency could be restored, and the Oklahoma County Criminal proceedings were suspended. On November 22, 1991, and November 25, 1991, the Seminole County District Court judge and petitioner's retained counsel filed separate applications for determination of competency in Case Number CRF-91-274. The Oklahoma Court of Criminal Appeals

subsequently held that Oklahoma County's determination of petitioner's incompetency was binding upon the Seminole County District Court until his competency was restored and all criminal proceedings could be resumed.

Petitioner was released from Eastern State Hospital on February 25, 1992, and returned to the Oklahoma County Jail for further competency proceedings. A jury trial on the issue of competency was held on May 18-19, 1992. The jury found petitioner was competent, so criminal proceedings in Oklahoma County and Seminole County resumed. However, on August 19, 1992, petitioner escaped from the Seminole County Jail, resulting in new criminal charges in Seminole County Case Number CRF-92-170 upon his recapture. On or about August 26, 1992, petitioner's counsel in Seminole County Case Number CRF-91-274 filed another application for determination of competency. On that same day the district court stayed the proceedings and set a competency hearing for August 28, 1992, but no further hearings or evaluations were conducted in either Seminole County case. Instead, the court accepted petitioner's waiver of preliminary examination and accepted his guilty pleas in CRF-91-274 on August 31, 1992. Petitioner later entered guilty pleas in Oklahoma County Case Number CF-91-5078 and Seminole County Case Number CRF-92-233.

On August 20, 1992, petitioner was charged in Sequoyah County, Oklahoma, District Court Case Number CRF-92-170. On January 11, 1994 his attorney filed a motion for psychological evaluation and

motion to continue the jury trial. While the record is unclear, the scheduled jury trial was not held, and petitioner entered guilty pleas in CRF-92-170 on February 7, 1994.

Although petitioner's habeas petition was filed outside the one-year time restriction, the Tenth Circuit Court held in *Miller v. Marr* that the limitations period of 28 U.S.C. §2244(d) may be subject to equitable tolling. See *Miller,* 141 F.3d at 978. The application of equitable tolling, however, is based upon a review of the individual circumstances of a particular case to determine if the habeas remedy has been rendered inadequate. *Id.* The limitations period may be tolled for extraordinary circumstances beyond a petitioner's control, but the petitioner still is required to diligently pursue his claims. *Id.* Petitioner alleges his legal and actual incompetence is an extraordinary circumstance over which he had no control, and he could not have exercised due diligence to discover his claims within the prescribed period. He claims, however, that since counsel's engagement on July 17, 1997, counsel has exercised due diligence to discover the factual predicates of petitioner's claims.

Petitioner maintains he has been factually and legally incompetent throughout all proceedings, based on the November 1991 Oklahoma County District Court's determination of his incompetency and the various applications to determine competency in his criminal cases. He also asserts that the jury trial which found him competent in May 1992 was conducted under the standard found unconstitutional in *Cooper v. Oklahoma,* 517 U.S. 348 (1996).

Petitioner has submitted a Psychological Report dated October 11, 1999, and prepared by Philip J. Murphy, Ph.D., the clinical psychologist who evaluated petitioner in October 1991, February 1992, and May 1992 with respect to the issue of competency in the Oklahoma County proceedings. Dr. Murphy testified at the Oklahoma County competency trial in May 1992 that he had diagnosed petitioner as paranoid schizophrenic and incompetent to stand trial. The 1999 report followed an evaluation of petitioner on September 29, 1999.

Dr. Murphy's report states that on August 25, 1992, he visited with petitioner at the Seminole County Jail after his recapture from the jail escape. At that time petitioner still suffered from paranoid schizophrenia and did not understand the nature, consequences, or ramifications of his actions in the escape. Petitioner had delusions that he was being watched by "enemies of the cartel," and he had escaped from those agents, not the jailers. He also believed his escape was made possible by the efforts of the Columbian drug cartel, which he headed. Dr. Murphy opined that petitioner was insane and incompetent to stand trial when he committed the crimes in Seminole and Sequoyah Counties, and he still is insane and incompetent to participate meaningfully in legal proceedings.

The court has carefully reviewed the record, including the transcript from petitioner's competency jury trial in May 1992. Dr. Murphy testified at the trial that petitioner understood the nature of the crimes with which he had been charged and the roles of defense

counsel, the prosecutor, the judge, and the jury (Tr. I, 82-83). However, Dr. Murphy believed petitioner could not rationally assist his attorney, because he was delusional and schizophrenic (Tr. I, 82).

Anita Jeanne Russell, Ph.D., a licensed psychologist who was the director of forensic programs at Eastern State Hospital, testified at the competency jury trial that she interviewed petitioner twice, reviewed his prior mental health treatment, had various psychological tests and an EEG performed, and completed a neurological consultation on petitioner at the hospital (Tr. II, 6-7, 15-16, 24-25). Based on her evaluation, Dr. Russell stated that petitioner was able to appreciate the charges, their seriousness, and possible consequences (Tr. II, 25, 29-30). Petitioner also was able to rationally communicate with staff and his attorney and rationally assist in the preparation of his defense (Tr. II, 25, 30). Petitioner's MMPI-2 test was invalid, because he seemed to be exaggerating or over-reporting his symptoms and problems (Tr. II, 26-27). Dr. Russell found no indication that petitioner was experiencing hallucinations (Tr. II, 28-29). He understood the roles of the defense attorney, the district attorney, and the judge, and he understood the different plea options available to him (Tr. II, 30). Dr. Russell further stated that she found no signs of a major mental illness, as defined by the applicable statute (Tr. II, 31). While petitioner could have a character disorder, such as narcissistic and antisocial traits, he did not present with a disorder of the thought process (Tr. II, 31-32).

Respondent asserts in his Reply to this Court's

Order Dated June 2, 2000 [Docket #25] that"Dr. Murphy's report makes no reference to the nature and extent of his most recent evaluation and it is difficult to tell what procedures were recently administered and what old tests have been intertwined." Respondent also questions the validity of Dr. Murphy's report and Dr. Murphy's credibility, because on January 22, 2000, the Oklahoma State Board of Examiners placed Dr. Murphy on probation for three years. *See State of Oklahoma, ex rel. State Bd. of Examiners of Psychologists v. Murphy,* No. ADML 99-0013, BC98-9 (Okla. State Bd. of Examiners of Psychologists Jan. 22, 2000). According to the Administrative Order entered in the matter, Dr. Murphy was hired to consult with the defense attorney in a murder case in Boone County, Missouri. Dr. Murphy's test results for the defendant were found to be invalid, and he inappropriately used tests in matters for which they were not standardized. In addition, Dr. Murphy failed to report test results on which the defendant scored within normal limits and apparently fabricated data. He also misrepresented his qualifications by stating in a deposition that he was board certified in forensic neuro-psychology by the American College of Forensic Examiners. After Dr. Murphy's deposition, he amended his report and conclusions for no justifiable reason.

There is a rebuttable presumption of a defendant's continued incompetence. *See Sena v. New Mexico State Prison,* 109 F.3d 652, 655 (10th Cir. 1997). However, even disregarding the possibility that Dr. Murphy's opinion is not valid, this court finds the presumption of incompetence was overcome by the

subsequent determinations of petitioner's mental condition which found him competent. Although petitioner argues the May 1992 competency trial was conducted under the unconstitutional "clear and convincing" standard, the court finds petitioner has not shown, given the evidence presented at the competency trial, that he would not have been found competent in May 1992 under the correct standard of a preponderance of the evidence. *See Cooper,* 517 U.S. at 355.

The court, therefore, finds petitioner has failed to demonstrate his incompetence which he claims will toll the limitations period for filing a habeas petition. The inquiry under 28 U.S.C. § 2244(d)(1)(D) is when the factual predicate of a claim could have been discovered. After a careful review of the record, it is clear that all of petitioner's claims were discoverable at the time of his plea. The court finds he has failed to show he exercised due diligence in pursuing his federal habeas claims or that extraordinary circumstances beyond his control prevented him from timely filing his petition. Further, he offers no explanation for the ten-month delay in filing this habeas petition after the Court of Criminal Appeals affirmed the denial of post-conviction relief. Finally, petitioner does not contend the alleged constitutional violations have resulted in the conviction of one who actually is innocent of the crimes. *See Miller,* 141 F.3d at 978 (citing *Schlup v. Delo,* 513 U.S. 298, 323-29(1995)).

The court further finds petitioner has failed to show the one-year limitations period has rendered

habeas relief inadequate or ineffective to test the legality of his detention. The statute of limitations imposed by the AEDPA does not suspend the writ of habeas corpus; instead, it requires prisoners to act within a reasonable time period to pursue their federal remedies. The court, therefore, finds no denial of due process or suspension of the writ of habeas corpus.

ACCORDINGLY, petitioner's Motion to Amend Petition for Writ of Habeas Corpus is OVERRULED, petitioner's Motion for Evidentiary Heating is OVERRULED, respondent's Motion to Dismiss Time Barred Petition is GRANTED, and this action is DISMISSED in its entirety. The court also denies a certificate of appealability.

IT IS SO ORDERED this 27th day of September, 2000.

/s/_____
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV 98-593-B

Filed, August 3, 1999

JOHN HADLEY FISHER, *Petitioner,*

v.

GARY GIBSON, Warden, *Respondent.*

ORDER

This matter is before the court on respondent's motion to dismiss petitioner's amended petition for a writ of habeas corpus. Petitioner, an inmate currently incarcerated at Oklahoma State Penitentiary in McAlester, Oklahoma, attacks his convictions and sentences in Sequoyah County, Oklahoma, District Court Case Number CRF-92-170 for Unlawful Use of Injurious Substance or a Bomb (Count 1), Shooting with Intent to Kill (Count 2), Feloniously Pointing a Weapon (Count 6), and Feloniously Pointing a Weapon (Count 7).

Petitioner sets forth the following grounds for relief:

I. The trial court was without jurisdiction to hold a preliminary hearing, accept a guilty plea or impose sentence--depriving petitioner of due process of law.

II. The trial court entertained doubt as to petitioner's competency.

III. The trial court failed to order an examination or to conduct any reasonable inquiry as to petitioner's competency or to hold a competency hearing at any time prior to the limited inquiry during petitioner's guilty plea proceedings, thereby allowing the state to convict an incompetent person in violation of petitioner's substantive due process rights.

IV. Petitioner's court appointed attorney failed to investigate petitioner's extensive and recent mental health history or to pursue available psychiatric defenses regarding competency and sanity, such that petitioner was denied effective assistance of counsel warranting relief.

Respondent has filed a motion to dismiss, alleging the petition was filed beyond the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(d) ("AEDPA"). The record indicates that on February 7, 1994, a Judgment and Sentence was entered in CRF-92-170, pursuant to petitioner's plea of guilty. Petitioner did not seek to timely withdraw his guilty plea or seek a direct appeal to the Oklahoma Court of Criminal Appeals. Petitioner's conviction, therefore, became final on February 17, 1994, ten days after entry of the Judgment and Sentence. *See* Okla. Stat. tit. 22, § 1051; Rule 4.2, *Rules of the Court of Criminal Appeals,* Okla. Stat. tit. 22, Ch. 18, App., Sup. Ct. R. 13. On August 13, 1997, petitioner filed an application for post-conviction relief. The trial court denied the application, finding the issues could have been raised on direct appeal. *See State v. Fisher,* No. CRF-92-170, slip op. at 3 (Sequoyah County Dist. Ct. Nov. 21, 1997). The Oklahoma Court of Criminal Appeals affirmed the denial in *Fisher v. State,* No. PC 97-1725 (Okla. Crim. App. Feb. 13, 1998).

On April 24, 1996, the President signed the AEDPA into law, amending 28 U.S.C. § 2244 to add a one-year statute of limitation period for filing a writ of habeas corpus by state prisoners:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest

of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Respondent alleges petitioner had one year from February 17, 1994, the date his conviction became final, to file a habeas petition, and petitioner missed this deadline. Petitioner asserts that, pursuant to 28 U.S.C. § 2244(d)(1)(D), he is within the limitations period. He claims he was legally and actually incompetent to knowingly seek relief, based on the Oklahoma County District Court's finding of his incompetency on November 22, 1991. He contends the incompetency finding still stands, because no other constitutional competency hearings have been held. Under this theory, petitioner alleges the statute of limitations should commence on July 17, 1994, the date he engaged counsel to challenge his convictions. Petitioner also claims the time spent in post-conviction proceedings from August 13, 1997, to February 13, 1998, should toll the limitations period. According to petitioner's calculations, he had until January 17, 1999, to file this petition. The petition was filed on December 21, 1998.

The Tenth Circuit Court of Appeals has held that a petitioner whose conviction became final on or before April 24, 1996, must file his petition for a writ of habeas corpus before April 24, 1997. *See Miller v. Marr,* 141 F.3d 976, 977 (10th Cir. 1998), *cert. denied,* __U.S.__, 119S.Ct. 210 (1998); *see also United States v. Simmonds,* 111 F.3d 737, 746 (10th Cir. 1997). Under this analysis, petitioner's one-year limitations period began to run on April 24, 1996, the effective date of AEDPA. The court is required to toll time spent in properly filed state post-conviction litigation, *see Hoggro v. Boone,* 150 F.3d 1223, 1226-27 (10th Cir. 1998), but petitioner's

post-conviction proceedings did not begin until after expiration of the limitations period. Therefore, no additional tolling is permitted for the post-conviction period. *See Rashid v. Khulmann,* 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid the statute of limitations.")

Although petitioner's habeas petition was filed outside the one-year time restriction, the Tenth Circuit Court held in *Miller* that the limitations period of 28 U.S.C. § 2244(d) may be subject to equitable tolling. *See Miller,* 141 F.3d at 978. The application of equitable tolling, however, is based upon a review of the individual circumstances of a particular case to determine if the habeas remedy has been rendered inadequate. *Id.* The limitations period may be tolled for extraordinary circumstances beyond a petitioner's control, but the petitioner still is required to diligently pursue his claims. *Id.* Petitioner alleges his legal and actual incompetence is an extraordinary circumstance over which he had no control, and he could not have exercised due diligence to discover his claims within the prescribed period. He claims, however, that since counsel's engagement on July 17, 1994, counsel has exercised due diligence to discover the factual predicates of petitioner's claims.

The record indicates that in September 1991, petitioner was charged in Seminole County, Oklahoma, Case Number CRF-91-274 and in Oklahoma County, Oklahoma, Case Number CF-91-5078. Upon petitioner's application to determine his competency to undergo further proceedings, the Oklahoma County case was

stayed and a competency examination was ordered. A post-competency hearing was held following the evaluation, and petitioner was found to be mentally incompetent. *See State v. Fisher* No. CF-91-5078 (Okla. County Dist. Ct. Nov. 22, 1991). The trial court committed petitioner to Eastern State Hospital for treatment and ordered the hospital director to make regular reports about petitioner's status. *Id.* The Oklahoma Court of Criminal Appeals subsequently held that the Oklahoma County stay applied to any criminal proceedings initiated by the State of Oklahoma and granted petitioner's petition for a writ of prohibition against proceeding with the charges in Seminole County Case Number CRF-91-274 until petitioner achieved competency. *See Fisher v. Dist. Ct. of Seminole County,* No. P-91-1157, slip op. at 3 (Okla. Crim. App. Feb. 3, 1992).

Petitioner stayed in Eastern State Hospital for approximately two months before being returned to the Oklahoma County Jail. *See* Petitioner's Supplemental Statement of Facts, Exhibit D at 2. In a letter dated January 22, 1992, Jeanne Russell, Licensed Psychologist and Director of Forensic Programs at Eastern State Hospital, advised the Oklahoma County District Court that petitioner was competent to stand trial in CR-91-5078. *See* Exhibit A to Brief in Support of Motion to Dismiss. A competency jury trial was held on May 11-12, 1992, in connection with the Oklahoma County case, and petitioner was found competent. *See* Petitioner's Supplemental Statement of Facts, Exhibit D at 2. Criminal proceedings in both Oklahoma County and Seminole County were resumed. *Id.* Over the next

sixteen months, petitioner entered guilty pleas and was convicted in the Oklahoma County Case Number CF-91-5078 and Seminole County Case CRF-92-233.

Petitioner was transferred to the Seminole County Jail, but he escaped on August 19, 1992. Following his recapture, additional charges were filed in Seminole County District Court Case Number CRF-92-233 and Sequoyah County District Court Case Number CRF-92-170, the latter of which is the subject of this habeas petition. The Seminole County Jail authorities placed petitioner on Thorazine, and petitioner's attorney filed an Application for Determination of Competency in Seminole County Case Number CRF-91-274 on August 26, 1992.

The Application for Determination of Competency alleged Phillip Murphy, Ph.D., a clinical psychologist, had examined petitioner extensively on at least four occasions and made a diagnosis of paranoid schizophrenia. *Id.* Petitioner was being medicated with the anti-psychotic drug Thorazine, and Dr. Murphy concluded that petitioner's mental condition and delusional thinking had rendered him incompetent. *Id.* at 3. In response to the application, the Seminole County District Court set a competency hearing for August 28, 1992. *See State v. Fisher,* No. CRF-91-274 (Seminole County Dist. Ct. Aug. 26, 1992).

According to petitioner, however, no further evaluations were conducted, and no competency hearing was held in Seminole County Case Number CRF-91-274. Instead, the Seminole County District Court accepted

petitioner's waiver of preliminary examination. On August 31, 1992, the Seminole County District Court accepted petitioner's guilty pleas in CRF-91-274, and petitioner was received at Oklahoma State Penitentiary ten days later.

On January 11, 1994, petitioner's attorney filed a Motion for Psychological Evaluation in Sequoyah County Case Number CRF-92-170, the conviction being challenged in this habeas action. The following day, petitioner filed a motion to continue the jury trial scheduled for January 20, 1994, until the competency issue could be resolved. No jury trial was held, but petitioner entered guilty pleas on February 7, 1994. The trial court specifically determined at the plea hearing that petitioner was competent to enter his plea, based on petitioner's and counsel's statements. *See* Transcript of Plea at 4, 9-10, Exhibit Q of Petitioner's Supplemental Statement of Facts and Memorandum of Law in Support of Petition for Writ of Habeas Corpus.

Petitioner maintains the November 1991 Oklahoma County District Court's determination of his incompetency still is in effect, because the subsequent jury trial which found him competent in May 1992 was conducted under the standard found unconstitutional in *Cooper v. Oklahoma*, 517 U.S. 348 (1996). He further asserts the subsequent mental evaluations and findings by the state court did not affect his status as an incompetent person. Under this theory, petitioner still is incompetent, yet at some point he recognized the need to engage an attorney to attack his convictions.

Petitioner cites no authority for his proposition that the statute of limitations should be tolled until an allegedly incompetent petitioner engages counsel. Although he asserts his incompetence prevented him from exercising due diligence until that time, he does not inform the court of the date he regained his competency and was able to hire counsel. Further, he offers no explanation for the ten-month delay in filing this habeas petition from the date the Court of Criminal Appeals affirmed the denial of post-conviction relief. Petitioner's alleged incompetence does not account for this delay in proceeding with the habeas action.

While there is a rebuttable presumption of continued incompetence, *see Sena v. New Mexico State Prison*, 109 F.3d 652, 655 (10th Cir. 1997), *cert. denied*, __ U.S.___, 119 S.Ct. 1471 (1999), the court finds this presumption was overcome by the subsequent determinations of petitioner's mental condition which found him competent. Although petitioner argues the May 1992 competency trial was conducted under the unconstitutional "clear and convincing" standard, the court finds petitioner has not shown, given the evidence presented at the competency trial, he would not have been found competent in May 1992 under the correct standard of a preponderance of the evidence. *See Cooper*, 517 U.S. at 355.

The court, therefore, finds petitioner has failed to demonstrate his incompetence which he claims will toll the limitations period for filing a habeas petition. The inquiry under 28 U.S.C. § 2244(d)(1)(D) is when the factual predicate of a claim could have been discovered.

After a careful review of the record, it is clear that all of petitioner's claims were discoverable at the time of his plea. The court finds he has failed to show he exercised due diligence in pursuing his federal habeas claims or that extraordinary circumstances beyond his control prevented him from timely filing his petition. Further, petitioner does not contend the alleged constitutional violations have resulted in the conviction of one who actually is innocent of the crimes. *See Miller,* 141 F.3d at 978 (citing *Schlup v. Delo,* 513 U.S. 298,323-29 (1995)).

Petitioner argues that if this petition is not allowed under the provisions of 28 U.S.C. § 2244(d)(1)(D), the AEDPA violates the Suspension Clause and the Due Process Clause of the United States Constitution. He maintains that, contrary to the trial court's findings, he was convicted while incompetent, so he has a constitutional right to challenge his conviction through a petition for a writ of habeas corpus.

> Whether the one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy "inadequate or ineffective" to test the legality of detention. *Swain v. Pressley,* 430 U.S. 372,381 (1977); *United States v.Hayman,* 342 U.S. 205,223 (1952). The burden is on the petitioner to demonstrate inadequacy and ineffectiveness. *See Bradshaw v. Story,* 86 F.3d 164, 167 (10th Cir. 1996).

Miller, 141 F.3d at 977.

The court finds petitioner has failed to show the one-year limitations period has rendered habeas relief inadequate or ineffective to test the legality of his detention. The statute of limitations imposed by the AEDPA does not suspend the writ of habeas corpus; instead, it requires prisoners to act within a reasonable time period to pursue their federal remedies. The court, therefore, finds no denial of due process or suspension of the writ of habeas corpus.

ACCORDINGLY, respondent's motion to dismiss time barred petition is GRANTED, and this action is DISMISSED in its entirety.

IT IS SO ORDERED this 3rd day of August, 1999.

/s/_____
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-98-965-T

Filed, November 22, 1999

JOHN HADLEY FISHER,)
Petitioner,)
)
v.)
)
GARY GIBSON, Warden,)
Respondent.)
)

ORDER

Petitioner John Hadley Fisher instituted this action pursuant to 28 U.S.C. 2254, seeking a writ of habeas corpus. Consistent with 28 U.S.C, § 636(b)(1)(B), the matter was referred to Magistrate Judge Gary M. Purcell, who has issued his Supplemental Report and Recommendation, suggesting that the petition be dismissed as untimely and that a certificate of appealability be denied. The petitioner has filed an objection, contending that an evidentiary hearing is required to determine the petitioner's competency; that his petition was filed within the time restrictions of 28 U.S.C. § 2244(d)(1); that the limitations period should be

equitably tolled under § 2244(d)(1)(D) and, if not, the AEDPA violates the Suspension Clause; and that Oklahoma's procedural default rule does not apply to the plaintiffs habeas action.

The court has considered de novo the petitioner's claims. The court recognizes that after Judge Ricks made an incompetency finding on November 18, 1991, petitioner's competency was subsequently determined by a jury in 1992 under a constitutionally impermissible standard of proof (clear and convincing). Consequently, he is "entitled to some form of relief if the record evidence is sufficient to raise a bona fide doubt as to his competency at the time of his trial." Walker v. Attorney Gen. for State of Okla., 167 F.3d 1339, 1345 (10th Cir. 1999), *cert. denied,* __U.S.__ (1999). The court concurs, however, with the magistrate judge's finding that the petitioner's assertion of actual incompetence at the time of his convictions is not supported by the record." Supplemental Report and Recommendation, pp. 9-10. *See id.* at 1345-47

The court also finds that the petitioner has not demonstrated that § 2244(d)(1)(D) determines the commencement of the one year limitations period or that the period should be equitably tolled. The petitioner's argument that if § 2244(d)(1)(D) is not applied to determine the limitations period applicable to his habeas petition, then the AEDPA violates the Suspension Clause, is not persuasive.

Accordingly, the court adopts the Report and Recommendation of Magistrate Purcell, dismisses the

petition as being untimely and denies a certificate of appealability.

IT IS SO ORDERED this 22 day of November, 1999.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-98-965-T

Filed, August 27, 1999

JOHN HADLEY FISHER,)
Petitioner,)
)
v.)
)
GARY GIBSON, Warden,)
Respondent.)
)

SUPPLEMENTAL REPORT AND RECOMMENDATION

This is a Petition for a Writ of Habeas Corpus brought by Petitioner, who appears with counsel, pursuant to 28 U.S.C. §2254. In a Report and Recommendation entered February 8, 1999, the undersigned recommended that the Petition be dismissed without prejudice for failure to exhaust state court remedies. Petitioner objected to the Report and Recommendation, contending that requiring him to exhaust state court remedies would be futile. By Order entered March 19, 1999, the matter was recommitted to the undersigned for further proceedings in accordance with 28 U.S.C. §636(b)(1)(B). Inasmuch as the matter

may be resolved on the basis of the record and the law, and because Petitioner has not shown a justifiable failure to develop the factual bases of his claims in state court, an evidentiary hearing is not necessary. 28 U.S.C. §2254(e)(2); Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The initial Report and Recommendation is hereby vacated, and for the following reasons it is recommended that the Petition be dismissed.

The Petitioner challenges the convictions entered against him in the District Court of Oklahoma County, Case No. CF-91-5078, on January 21, 1994, pursuant to his guilty plea. The convictions and the sentences imposed against Petitioner under a plea agreement are as follows: Count 1, Conspiracy to Commit a Felony, 10 years; Count 2, Burglary in the Second Degree, 7 years; Count 3, Kidnapping for Purpose of Extortion, life; Count 4, Kidnapping for Purpose of Extortion, life; Count 5, Robbery in the First Degree, life; Count 6, Unauthorized Use of a Motor Vehicle, 5 years; Count 7, Assault While Masked or Disguised, 20 years; Count 8, Possession of a Sawed-Off Shotgun, 2 years; Count 9, Concealing Stolen Property, 5 years, with all sentences to run concurrently with each other and with the life-without-parole sentence he was then serving for his conviction in Case No. CRF-91-274, District Court of Seminole County.[1]

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[1] As a part of the plea agreement, Count 10 was dismissed by the prosecution.

Petitioner did not appeal the convictions, and he admits that he has not sought collateral relief from the convictions in state court. Nevertheless, Petitioner alleges (1) that his right to procedural due process was denied when the trial court determined his competency under a clear-and-convincing-evidence standard, and (2) that his right to substantial due process was denied by the trial court's acceptance of his guilty plea despite his actual incompetency. Respondent moved to dismiss the Petition on the grounds that the Petition is time-barred by operation of 28 U.S.C. §2244(d) and, alternatively, that the Petition should be dismissed for lack of exhaustion of state court remedies or on the basis of procedural default. Because Petitioner did not allege that he had ever presented a substantive actual incompetency claim in a post-conviction application and there was no evidence that any substantive actual incompetency claim had been presented to the state courts, the undersigned recommended in the initial Report and Recommendation that the Petition be dismissed without prejudice to refiling upon exhaustion of state court remedies.

In his objection to the Report and Recommendation, Petitioner for the first time submitted documentary evidence showing that he has filed applications for post-conviction relief in two unrelated collateral proceedings challenging convictions entered in Seminole County and Sequoyah County district courts. Petitioner contends that he raised actual incompetency issues in both of these collateral proceedings, and that the Oklahoma Court of Criminal Appeals ("OCCA") refused to review the claims based on Petitioner's

procedural default on appeal. Because of these prior proceedings, Petitioner contends that it would be futile to require him to return to the state courts to raise the same issue because the state courts have already applied a procedural bar in the other cases in which the same issue was raised.

The documentary evidence presented by Petitioner of the post-conviction challenges filed in Seminole County and Sequoyah County shows that Petitioner did, indeed, raise substantive actual incompetency claims in those applications. See Petitioner's Objection, Ex. A (Proposition I), Ex. C (Proposition III). In the appeal from the Seminole County post-conviction application, Petitioner supported his actual incompetency claim by referring to an order entered by a special judge in that matter on August 26, 1992. Id., Ex. C, at 14. In the appeal from the Sequoyah County post-conviction application, Petitioner supported his actual incompetency claim by referring to the plea transcript in the Sequoyah County proceeding as well as Petitioner's "lengthy mental health history." Id., Ex. A, at 7-9. Thus, the factual bases for his actual incompetency claims in those state court collateral proceedings were specific to the facts in those cases, and there is no showing that Petitioner has given the state courts a "fair opportunity" to determine the actual incompetency claim raised in the Petition. See Anderson v. Harless, 459 U.S. 4, 6 (1982) *(per curiam).*

Nevertheless, Petitioner contends that if this Court was to find that he has not exhausted his state court remedies, Petitioner would be unable to seek

habeas relief following exhaustion of state court remedies due to the expiration of the limitation period in 28 U.S.C. §2244(d). Because the Tenth Circuit Court of Appeals has recognized that a claim of actual incompetence may "raise[ ] serious constitutional questions" as to the availability of the habeas remedy, Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), .cert. denied, __U.S.__, 119 S.Ct. 210 (1998), and because the limitation period expired before the instant Petition was filed, as found below, the undersigned declines to recommend that the Petition be dismissed for lack of exhaustion.

Respondent alternatively contends that the Petition should be dismissed under 28 U.S.C. §2244(d)(1)(A) because the one-year limitation period applicable to this habeas Petition expired on April 23, 1997. See United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997). Petitioner was convicted on January 21, 1994, and he did not appeal the convictions in Case No. CRF-91-5078. The statute which establishes the one-year limitation period governing the filing of federal habeas petitions mandates that the period begins to run on the"date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review" unless one of the alternative circumstances set forth in the statute mandates a later starting point for the limitation period. 28 U.S.C. §2244(d)(1). In recognition of the retroactivity problem in applying the statute to prisoners whose convictions became final more than one year before the statute became effective, the Tenth Circuit Court of Appeals granted such prisoners a one year

"grace" period which gave the prisoners until April 23, 1997, to file their federal habeas actions. Hoggro v. Boone, 150 F.3d 1223, 1225-1226 (10th Cir. 1998). Under the operation of §2244(d)(1)(A), Petitioner had until April 23, 1997, to file his federal habeas Petition.

Petitioner contends, however, that §2244(d)(1)(A) does not provide the starting point for determining the limitation period applicable to his habeas Petition. Rather, Petitioner contends that §2244(d)(1)(D) provides the appropriate statutory starting point because "prior to petitioner's convictions and up to the present petition before this court, petitioner has been legally incompetent to knowingly seek relief." Petitioner's Response Brief to Respondent's Motion to Dismiss Time Barred Petition, at 2. Section 2244(d)(1)(D) provides that where the "factual predicate of the [habeas] claim or claims" could not have been discovered through due diligence prior to the conclusion of direct review or the time for seeking direct review, the limitation period does not begin to run until "the date on, which [such] factual predicate...could have been discovered through the exercise of due diligence." 28 U.S.C.. §2244(d)(1)(D). Allegations of false testimony by a prosecution witness, supported by newspaper reports that the witness had acknowledged falsely testifying at multiple trials, have been found to fall within the exception set forth in §2244(d)(1)(D). Sierra v. Evans, No. 98-6040, 1998 WL 712578 (10th Cir. Oct. 13, 1998) (unpublished opinion cited as persuasive authority pursuant to Tenth Cir. R. 36.3). However, Petitioner relies solely on an incompetency finding by Oklahoma County District Judge Ricks entered on November 18, 1991, over two

years prior to Petitioner's guilty plea and convictions. This allegation of legal incompetency entered some seven years before his habeas Petition was filed is not sufficient to warrant extension of the usual limitation period. See Jackson v. Hargett No. 98-6419, 1999 WL 527720 (10th Cir. July 23, 1999) (allegation of incompetency at time of state court conviction, almost 11 years prior to filing of habeas petition does not warrant extension of limitation period) (unpublished disposition cited as persuasive authority pursuant to Tenth Cir. R. 36.3).

In his objection to the initial Report and Recommendation, Petitioner for the first time asserts that his "actual, factual" incompetency also rendered him unable to exercise due diligence to discover the factual bases for his claim. Petitioners Objection, at 6. Although he asserts actual incompetency, Petitioner is relying solely on the 1991 judicial incompetency finding and a purported "rebuttable presumption of continued incompetence." However, Petitioner does not submit any evidence creating a reasonable doubt about his competence either at the time of his convictions or during the relevant period for filing his habeas Petition. See Pate v. Robinson, 383 U.S. 375, 385 (1966) (if evidence exists which creates genuine, reasonable doubt about defendant's competence, court must hold hearing to resolve the doubt).

In Miller, the Tenth Circuit contemplated that extraordinary circumstances, *i.e.*, that a constitutional violation has resulted in the conviction of one who is actually innocent or incompetent, may warrant equitable

tolling of the §2244(d)(1) limitation period. Miller, 141 F.3d at 978. Thus, the Court must consider whether tolling of the one-year limitation period is appropriate in this matter. In Sena v. New Mexico State Prison, 109 F.3d 652 (10th Cir. 1997), the Tenth Circuit Court of Appeals found that a "prior adjudication of incompetence in this case gives rise to a rebuttable presumption of continued incompetence [that] applies in habeas corpus,...but may be overcome by competent evidence." Id. at 655. However, the circumstances in that case differ significantly from the circumstances herein. In Sena, the state court held a competency hearing where the petitioner was determined to be incompetent. The petitioner was hospitalized for treatment, and no subsequent competency hearing was conducted prior to his guilty plea. Id. at 653-654. In this case, Petitioner was determined to be incompetent, he was hospitalized for treatment for a 90-day period, and he was then returned to state custody upon the recommendation of treating authorities that he was competent to stand trial. A competency trial was conducted at which Petitioner was found to be competent for trial. Almost two years later Petitioner entered a guilty plea pursuant to a plea agreement, and at the plea proceeding Petitioner's counsel attested to his competency, Petitioner attested to his ability to comprehend the nature of the charges and the proceedings, and the trial court found that Petitioner was competent to enter the guilty plea.

Nevertheless, even assuming that Sena applies to create a rebuttable presumption of incompetence, there is no substantial doubt concerning Petitioner's

competence to enter his plea, and therefore the presumption of incompetence has been rebutted. Subsequent to the 1991 competency determination, Petitioner underwent treatment at Eastern State Hospital from November 20, 1991, to February 25, 1992. The records of Petitioner's Eastern State Hospital treatment show that during his hospitalization, Petitioner was involved in one incident in which he fought with another patient and was given a sedative. Petitioner was later involved in an incident in which he threw chairs and turned over a table in his ward. He was given a sedative and placed in seclusion for a time. The hospital administrators noted this incident was actually a diversionary tactic intended to allow another patient to escape. Following the second disruptive incident, Petitioner was placed on Lithium for a short time because of schizoaffective traits. However, the medication was terminated when this diagnosis was eliminated on January 21, 1992. The majority of the hospital record shows Petitioner was quiet, calm, and cooperative. At the time of his discharge, his treating mental health professionals found no serious mental disorder and an underlying antisocial personality disorder. Psychological testing during his hospitalization revealed Petitioner has above average intelligence, and he was not on any medication at the time of his discharge. Plaintiff was released for a home visit on January 28, 1992, and did not return to the hospital. He was formally discharged on February 25, 1992, back to Oklahoma County authorities. Petitioner's Supplemental Statement of Facts;App. II. On January 22, 1992, Dr. Jeanne Russell, the Petitioner's treating psychologist at Eastern State

Hospital, reported to Judge Ricks that Petitioner was (1) able to appreciate the nature of the charges against him, (2) able to consult with his lawyer and rationally assist in the preparation of his defense, and (3) not mentally ill or a person requiring treatment under state law. Respondent's Reply Brief, Ex. A. In her narrative summary, Dr. Russell stated that Petitioner "does not appear to be afflicted with a substantial disorder of thought, mood, perception or memory, but may suffer from a character disorder which includes narcissistic and antisocial traits. This does not appear to interfere with his returning to court....Intelligence testing indicated that he has an above average IQ and has the capacity to both testify and manage his behavior in the courtroom. Overall, [Petitioner] appears to appreciate his charges and have the ability to rationally participate in his defense." Id.

Petitioner was returned to Oklahoma County, and a jury trial was conducted to determine whether Petitioner had attained competency. The jury determined that Petitioner was competent, and the criminal proceedings against him resumed. Petitioner contends that this jury determination is irrelevant because the jury was instructed that Petitioner had the burden to prove his incompetency by clear and convincing evidence, and this standard of proof was found to be unconstitutional in Cooper v. Oklahoma, 517 U.S. 348 (1996).

However, even disregarding this jury determination, Petitioner's assertion of actual incompetence at the time of his convictions is not

supported by the record, which includes the written record of the guilty plea proceeding conducted in January 1994 in Case No. CRF-91-5078. The "Plea of Guilty Summary of Facts" form which memoralizes this proceeding reflects that Petitioner stated he was not taking any medication, that he understood the charges against him and the punishment for those charges, that he understood the trial right that he was waiving, that he wished to plead guilty pursuant to a plea agreement, that he was pleading "guilty" to the charges, that his plea was voluntary, and that he did not know of any legal reason why he should not be sentenced at that time. Respondent's Reply Brief, Ex. B. Petitioner's attorney represented that he had no reason to believe Petitioner was not mentally competent to understand the proceedings, the charges, the nature and consequences of his acts at the time they were committed, and to assist in his defense. Id. The trial judge made the finding at this proceeding that Petitioner was competent, and after Petitioner was sentenced and advised of his appeal rights, Petitioner again stated that he had fully understood the questions asked at the proceeding that he had voluntarily answered the questions, that the written Summary of Facts was a true statement of the questions asked and his answers, and that he did not desire to change the written Summary of Facts or add anything to it. Id.

There is no hint of incompetency from the written record of the plea proceeding and no hint of incompetency during the intervening four years preceding the filing of the instant Petition. Therefore, the presumption of continued incompetency has been

overcome, and Petitioner has not shown either (1) that 28 U.S.C. §2244(d)(1)(D) is applicable to determine the starting point for the one-year limitation period or (2) that there are extraordinary circumstances in this case warranting a tolling of the limitation period beyond April 23, 1997. Because Petitioner did not file his habeas Petition until July 15, 1998, the limitation period expired before the Petition was filed, and the Petition should be dismissed on the ground that the applicable §2244(d)(1) limitation period has expired.

RECOMMENDATION

Based on the foregoing, it is recommended that the Petition for a Writ of Habeas Corpus be dismissed under 28 U.S.C. §2244(d). It is further recommended that the 28 U.S.C. §2253 Certificate-of Appealability be denied. The Petitioner is advised of his right to file an objection to this Supplemental Report and Recommendation with the Clerk of this Court by September 13, 1999, in accordance with 28 U.S.C. §636 and LCvR 72.1. Petitioner is further advised that failure to file a timely objection to this Supplemental Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

This Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 27th day of August, 1999.

/s/
GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-98-965-T

Filed, March 19, 1999

JOHN HADLEY FISHER, *Petitioner,*

vs.

GARY GIBSON, Warden, *Respondent.*

ORDER

Petitioner John Hadley Fisher, a state prisoner, instituted this action seeking a writ of habeas corpus under 28 U.S.C. § 2254. He challenges multiple state court convictions entered against him pursuant to a plea agreement on the grounds he was incompetent to plead guilty and the state court applied an unconstitutional burden of proof in determining his competency. Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred for initial proceedings to Magistrate Judge Gary M. Purcell, who issued a Report and Recommendation, concluding the petition should be dismissed without prejudice because the petitioner had failed to exhaust

his state court remedies.

The petitioner has filed an objection, and attached to it several orders issued by the Oklahoma Court of Criminal Appeals affirming the denial of post-conviction relief in two other cases involving the petitioner. Those orders should have been, but were not, submitted to the magistrate judge for his consideration. As they may affect his analysis of the exhaustion issue, the court concludes the matter should be recommitted to him to consider, the impact, if any, of these additional pleadings on his Report And Recommendation.

Accordingly, the matter is referred again to the magistrate judge for further proceedings consistent with this order.

IT IS SO ORDERED this 19th day of March, 1999.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-98-965-T

Filed, February 8, 1999

JOHN HADLEY FISHER)
Petitioner,)
)
vs.)
)
GARY GIBSON, Warden)
Respondent.)
)

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The Petitioner challenges the convictions entered against him in the District Court of Oklahoma County, Case No. CF-91-5078, on January 21, 1994, pursuant to his guilty plea. The convictions and the sentences imposed against Petitioner under a plea agreement are as follows: Count 1, Conspiracy to Commit a Felony, 10 years; Count 2, Burglary in the Second Degree, 7 years; Count 3, Kidnapping for Purpose of Extortion, life; Count 4, Kidnapping for Purpose of Extortion, life; Count 5, Robbery in the First

Degree, life; Count 6, Unauthorized Use of a Motor Vehicle, 5 years; Count 7, Assault While Masked or Disguised, 20 years; Count 8, Possession of A Sawed-Off Shotgun, 2 years; Count 9, Concealing Stolen Property, 5 years, with all sentences to run concurrently with each other and with the life-without-parole sentence he was then serving for his conviction in Case No. CRF-91-274, District Court of Seminole County.[1] Petitioner alleges as grounds for habeas relief from these convictions (1) that his plea of guilty was invalid because he was incompetent to enter the plea and (2) that the District Court of Oklahoma County applied an unconstitutional burden of proof in determining that he was competent. Respondent has moved to dismiss the Petition as time-barred by operation of 28 U.S.C. §2244(d), to which Petitioner has responded. In a reply brief ordered by the Court, Respondent alternatively contends that the Petition should be dismissed for lack of exhaustion of state court remedies or on the basis of procedural default. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U. S. C. §636(b)(1)(B). For the following reasons, it is recommended that the Respondent's motion be granted and the Petition be dismissed without prejudice to refiling following exhaustion of state court remedies.

Respondent moves to dismiss the Petition on the ground that it is barred by the limitation period prescribed in 28 U.S.C. §2244(d). Petitioner responds

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[1] As a part of the plea agreement, Count 10 was dismissed by the prosecution.

that the limitation period for filing his federal habeas petition should be tolled until the date he obtained present counsel because he "has been legally incompetent to knowingly seek relief." Petitioner's Response Brief, at 2. Petitioner alleges he retained counsel "on or about July 17, 1997," and that "[s]ince being employed to pursue this matter, [P]etitioner's counsel of record has exercised due diligence to discover the factual predicate of [P]etitioner's claim." Petitioner's Supplemental Statement of Facts, at 8; Petitioner's Response Brief, at 2. Petitioner contends that the Petition is consequently timely filed within the applicable one-year limitation period. Respondent replies that (1) Petitioner's *pro se* status does not excuse his compliance with federal procedural rules; (2) that it is Petitioner's due diligence and not his counsel's that is relevant to the tolling issue; (3) that his claim of legal incompetence was discoverable at the time of his competency trial held in May 1992; (4) that Petitioner cannot establish a claim of actual incompetence; and (5) that Petitioner has not demonstrated extraordinary circumstances warranting the equitable tolling of the limitation period beyond April 23, 1997.

The parties have presented this Court with a complex question involving the 28 U.S.C. §2244(d) limitation period applicable to Petitioner's habeas action. However, the preeminent question before the Court is whether Petitioner has exhausted available state remedies. A state prisoner bringing a federal habeas petition challenging the fact or duration of his confinement is required to exhaust state remedies before bringing his or her claims to federal court. 28 U.S.C.

§2254(b)(1); Preiser v. Rodriguez, 411 U.S. 475, 489-491, 500 (1973). As the Supreme Court recognized in Coleman v. Thompson, 501 U.S. 722 (1991), "[t]his Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Id. at 731. Petitioner contends that he was actually incompetent to enter his guilty plea to the charges in Case No. CF-91-5078, and the Tenth Circuit Court of Appeals has recognized that a claim of actual incompetence may "raise[ ] serious constitutional questions" as to the availability of the habeas remedy. Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998), cert. denied, 1998 WL 407280 (U.S. Oct. 5, 1998). Thus, Petitioner has not shown that he is precluded by the §2244(d) limitation period from filing a habeas petition following exhaustion of state court remedies.

The exhaustion requirement is "grounded in principles of comity; in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoners federal rights." Coleman, 501 U.S. at 731. The exhaustion rule codified at 28 U.S.C. §2254(b)(1) is "not a jurisdictional requirement," although it '"creates a strong presumption in favor of requiring the prisoner to pursue his available state remedies'" Castille v. Peoples, 489 U.S. 346, 350 (1989) (quoting Granberry v. Greer, 481 U.S. 129, 131 (1987)).[2] In this circuit, a petitioner satisfies the

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[2] Congress recognized the continuing importance of exhaustion for habeas petitioners by adopting a tolling provision for state post-conviction applications as part of the AEDPA's new filing limitation requirements. This provision, codified at 28 U.S.C.

exhaustion requirement for habeas proceedings by showing "either that a state appellate court has had an opportunity to rule on the same claim presented in federal court...or that at the time he filed his federal petition he had no available state avenue of redress...." White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

Petitioner concedes that he has not sought collateral relief from his Oklahoma County convictions in state court. However, Petitioner contends that requiring him to exhaust state court remedies is futile because he has previously sought post-conviction relief from other convictions in Oklahoma courts, and the state courts, including the Oklahoma Court of Criminal Appeals ("OCCA"), have repeatedly applied a procedural bar rule to deny post-conviction review of his claims and the claims of other inmates, which he alleges are "nearly identical" to the claims he raises herein.

Petitioner asserts both a substantive due process claim of incompetency to enter a guilty plea and a procedural due process claim involving the trial court's application of a now-invalidated burden of proof in his competency trial based on Cooper v. Oklahoma, 517 U.S. 348 (1996). Petitioner does not allege that he presented a substantive actual incompetency claim in his unrelated post-conviction applications, and there is no evidence in the record showing that his claim of

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§2244(d)(2), tolls the running of the one-year limitation period during the time that a prisoner has a post-conviction application pending in the state courts.

actual incompetence has ever been presented to the state courts. Although Petitioner correctly posits that federal habeas review of a substantive claim of incompetency is not affected by a state court procedural default, see Sena v. New Mexico State Prison, 109 F.3d 652 (10th Cir. 1997), Petitioner has not demonstrated that Oklahoma courts would hold all of his claims procedurally defaulted such that requiring exhaustion of his state remedies would be a futile exercise. See Coleman 501 U.S. at 732 ("habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him").

Even assuming that Oklahoma courts would apply the same procedural bar rule to his procedural due process claim, Petitioner also contends he was actually incompetent to enter a guilty plea. Respondent's argument that there remains a viable state procedure to address the merits of Petitioner's claims is well taken. See, *e.g.*, Banks v. State, 953 P.2d 344, 346 (Okla. Crim. App. 1998) ("the procedures established for criminal proceedings in Oklahoma provide for an appeal out of time when a prisoner could not appeal or his appeal was not timely filed 'through no fault of his own.'").

Petitioner's reliance on Wallace v. Cody, 951 F.2d 1170 (10th Cir. 1991), and Goodwin v. Oklahoma, 923 F.2d 156 (10th Cir. 1991), to support his futility argument is misplaced. In those cases, the Tenth Circuit Court of Appeals recognized that requiring exhaustion would be futile where the Oklahoma state

courts had recently issued decisions in other cases that resolved the precise legal issue raised by the petition. See Wallace, 951 F.2d at 1170-1171; Goodwin 923 F.2d at 157-158. Petitioner attempts to come within the Wallace and Goodwin futility rule by citing five capital cases in which the defendants raised a Cooper issue and the OCCA refused to review the issue. Wallace v. State, 935 P.2d 366 (Okla. Crim. App.), cert. denied, 117 S.Ct. 2489 (1997); McGregor v. State, 935 P.2d 332 (Okla. Crim. App.), cert. denied, 117 S.Ct. 2524 (1997); Rogers v. State, 934 P.2d 1093 (Okla. Crim. App. 1997); Valdez v. State, 933 P.2d 931 (Okla. Crim.App.). However, the OCCA applied a *resjudicata* and/or waiver rule in these cases because the defendants had either raised or failed to raise a Cooper-based claim in their direct appeals. Petitioner did not appeal his convictions, and Petitioner has not shown that the OCCA has previously decided the same legal issues he raises in the instant Petition or has refused to review the post-conviction application of an inmate like Petitioner who has never had a direct appeal. Therefore, Petitioner has not demonstrated that requiring him to exhaust his state court remedies would be futile. It is not at all apparent that Oklahoma courts will procedurally bar post-conviction review of Petitioner's claims, particularly in view of his assertion of actual incompetent to enter a guilty plea. See Banks, 953 P.2d at 346. Petitioner has not provided the state courts with a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim" Anderson v. Harless, 459 U.S. 4, 6 (1982) *(per curiam).* He has therefore failed to exhaust available state court remedies. Consequently, the Petition should be dismissed without prejudice to refiling following

exhaustion of state court remedies.

Additionally, for the reasons set forth herein, Petitioner fails to make a substantial showing of the denial of a constitutional right. Accordingly, the 28 U.S.C. §2253 Certificate of Appealability required to appeal the denial of the 28 U.S.C. §2254 Petition for a Writ of Habeas Corpus should be denied.

RECOMMENDATION

In view of the foregoing reasons, the undersigned recommends that the Respondent's Motion to Dismiss (Doc. #6) be granted and the 28 U.S.C. §2254 Petition for a Writ of Habeas Corpus challenging Petitioner's convictions in Case No. CF-91-5078 be dismissed without prejudice to refiling upon exhaustion of state court remedies. It is also recommended that a Certificate of Appealability be denied. The Petitioner is advised of his right to object to this Report and Recommendation on or before February 23, 1999, in accordance with 28 U.S.C. §636 and LCvR 72.1. Petitioner is further advised that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 8th day of February, 1999.

/s/_____
GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

APPENDIX I

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CF-91-5078

Filed, November 18, 1991

THE STATE OF OKLAHOMA, *Plaintiff,*	)
vs.	)
JOHN HADLEYFISHER, *Defendant.*	)

ORDER OF COMMITMENT

WHEREAS, an application was filed in this Court alleging that John Hadley Fisher, Defendant, was mentally incompetent, and this Court determined sufficient facts were alleged to raise a doubt as to the competency of the Defendant and that the Defendant was examined in the County Jail, and the same has been completed.

THEREAFTER, a post-examination competency hearing was had on the 18th day of November, 1991, Defendant appears and is represented by counsel James T. Rowan, and the State of Oklahoma appears by Fern

Smith Assistant District Attorney. The Court hears the evidence and finds the Defendant incompetent.

IT IS THEREFORE ORDERED that the Defendant be committed to Eastern State Hospital under the supervision of the director, or his designate, for treatment.

IT IS FURTHER ORDERED that the hospital director make reports to this Court every one hundred and twenty (120) days regarding the status of the Defendant. Should the Defendant achieve competency, the director is to immediately so notify this Court.

The Sheriff of Oklahoma County is ordered to transport the Defendant to Eastern State Hospital and make return of this Order showing the manner in which it was executed.

/s/_____
JUDGE OF THE DISTRICT COURT

APPROVED:

/s/_____
ASSISTANT DISTRICT ATTORNEY

/s/_____
JAMES T. ROWAN, #7787
ATTORNEY FOR DEFENDANT
Assistant Public Defender

APPENDIX J

IN THE DISTRICT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

CASE NO. CF-91-5078

Filed, May 19, 1992

JOHN HADLEY FISHER)
PETITIONER,)
)
VS.)
)
THE STATE OF OKLAHOMA,)
RESPONDENT)

ORDER TO RESUME PROCEEDINGS

Now on this 19th day of May, 1992, the same being the day appointed for hearing the Application for Determination of Competency filed in the above styled cause, after due notice of the hearing having been given as required by law and as directed by this Court, the State of Oklahoma, respondent, appearing by and through Mark A. Davidson, Assistant District Attorney, Oklahoma County, Oklahoma, and John Hadley Fisher, Petitioner, appearing by and through his Counsel, Jim Rowan, Assistant Public Defender.

Having said matter presented to a jury, and said

jury finding Petitioner to be competent, by clear and convincing evidence there is no doubt as to Petitioner's competency.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the criminal proceedings in the above styled cause shall be resumed.

/s/_____
Carolyn R. Ricks
District Judge

/s/_____
Mark A. Davidson
Assistant District Attorney

/s/_____
Jim Rowan
Attorney for Defendant

APPENDIX K

IN THE DISTRICT COURT OF SEMINOLE COUNTY STATE OF OKLAHOMA,

CRF-91-274

August 31, 1992

STATE OF OKLAHOMA,
PLAINTIFF,

vs.

JOHN HADLEY FISHER,
DEFENDANT.

* * * * * * * * *

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONORABLE LEE G. STILWELL IN WEWOKA, OKLAHOMA
ON THE 31ST DAY OF AUGUST, 1992

* * * * * * * * *

REPORTED BY: Terri L. Azbell, C.S.R.
P.O. Box 678
Wewoka, Oklahoma 74884
405-257-3386

DISTRICT COURT OF OKLAHOMA
OFFICIAL TRANSCRIPT

APPEARANCES:

MR. WILLIAM PETERSON, District Attorney, Seminole County, Wewoka, Oklahoma 74884, appearing on behalf of the State of Oklahoma.

MR. MICHAEL SHERROD, Assistant District Attorney, Seminole County, Wewoka, Oklahoma 74884, appearing on behalf of the State of Oklahoma.

MR. DAVID AUTRY, Attorney at Law, 1601 S.W. 89th, Oklahoma City, Oklahoma, appearing on behalf of the Defendant.

MR. WILLIAM DEVINNEY, Attorney at Law, 500 N.W. 13th, Oklahoma City, Oklahoma, appearing on behalf of the Defendant.

PROCEEDINGS

THE COURT: This is Case No. CRF-91-274, styled the State of Oklahoma vs. John Hadley Fisher. Let the record show that the state appears by Bill Peterson and Michael Sherrod. That the defendant appears in person and with counsel, Mr. David Autry and -- How do you pronounce your last name?

MR. DEVINNEY: Devinney.

THE COURT: I'm sorry?

MR. DEVINNEY: Devinney.

THE COURT: Devinney. All right. Mr. Fisher, this matter comes on for arraignment. If you'll approach the bench, please. Is John Hadley Fisher your true and correct name?

MR. FISHER: Yes, sir.

THE COURT: And you're twenty years of age?

MR. FISHER: Yes, sir.

THE COURT: And is Mr. Autry and Mr. Devinney, are they your lawyers?

MR. FISHER: Yes, sir.

THE COURT: Are you able to read and write

the English language?

MR. FISHER: Yes, sir.

THE COURT: And what grade did you complete in school?

MR. FISHER: Senior.

THE COURT: Okay. I've been handed certain paper work that has been substantially completed. I need to go over that with you at this time. Have you read through this and filled this out with your attorneys?

MR. FISHER: Yes, sir.

THE COURT: And are the answers that are written in true and correct to the best of your knowledge?

MR. FISHER: Yes, sir.

THE COURT: All right. You indicate that you are taking some medication at this time?

MR. FISHER: Yes, sir.

THE COURT: And have you taken one dose or one hundred milligrams of thorazine earlier today?

MR. FISHER: Yes, sir.

THE COURT: And was that prescribed by a

doctor?

MR. FISHER: Yes, sir.

THE COURT: Okay. You also indicate that you have been treated for a mental illness back in 1990 and then a time period in December of '91 through February of '92. Were you released from that treatment?

MR. FISHER: Yes, sir.

MR. DEVINNEY: He was, Your Honor.

THE COURT: Under the medication that's been prescribed?

MR. FISHER: Yes, sir.

THE COURT: All right. And I believe that was part of this proceeding; is that correct?

MR. AUTRY: Yes, Your Honor.

THE COURT: That there was a competency hearing heard actually in Oklahoma County.

MR. AUTRY: That's correct, Your Honor.

THE COURT: All right. Now, also, it is my understanding that in the file was a subsequent application for further mental evaluation that has been withdrawn?

MR. AUTRY: Yes, Your Honor.

THE COURT: Mr. Fisher, at this point in time you've had a chance to consult with your attorneys and go over the forms that are before me. The critical factors are first of all that you understand the charge, that you understand your rights, and that you're able today to assist your lawyers and present any defense or to respond to the charges that's filed. And let me ask you first of all, presently at this time, with the medication you're taking, do you understand your rights and the charge and wha~~t~~ we're doing here today?

MR. FISHER: Yes.

THE COURT: All right. Counsel, do you have any reason to believe your client is not competent at this time to assist you in presenting any defense to the charge?

MR. AUTRY: No, Your Honor.

THE COURT: Do you have any reason to believe he was not competent on the date of the acts alleged in the information?

MR. AUTRY: No, Your Honor.

THE COURT: You understand that in this case you're charged in CRF-91-274 with murder in the first degree and also a second count of conspiracy to commit murder, and have you and your lawyers had a copy of the charges?

MR. FISHER: Yes, sir.

MR. DEVINNEY: Yes, Your Honor.

THE COURT: And do you understand that if you were convicted or plead guilty to these crimes as now charged, the range of punishment for murder in the first degree ranges from a minimum -- the lowest sentence is life, that the maximum punishment would be the imposition of the death penalty; and on the charge of conspiracy to commit murder, that can carry a term of up to ten years in prison? Do you understand that those are the ranges of punishment, if you plead guilty you may be sentenced within those limits?

MR. FISHER: Yes, sir.

THE COURT: Okay. Do you understand that you're entitled to a speedy jury trial on the charge, each of them, you have the right to confront witnesses who testify against you at trial, and you have the right against self incrimination, that is to remain silent? You understand that those are constitutional rights, and if you plead guilty you'll give up those rights?

MR. FISHER: Yes, sir.

THE COURT: Do you want a jury trial?

MR. FISHER: No, sir.

THE COURT: Do you understand that you're presumed innocent of the crimes charged and you're

also presumed innocent of any lesser included offense, because of that presumption you have the right to maintain a plea of not guilty, that puts the burden on the State to prove you guilty beyond a reasonable doubt, either to a jury or to the Court if a jury is waived? Do you understand that presumption of innocence and understand that if you plead guilty that you're giving up that presumption of innocence and relieving the State of the burden of proving you guilty?

MR. FISHER: Yes, sir.

THE COURT: Have you talked over the charges with your lawyers, do you understand your rights, have they advised you in the matter and served you well?

MR. FISHER: Yes, sir.

THE COURT: Do you wish to enter a plea today?

MR. FISHER: Yes, sir.

THE COURT: In the event you plead guilty, do you or your attorneys have some agreement as to what the State or prosecution will recommend as punishment?

MR. AUTRY: Yes, Your Honor.

THE COURT: What is that, Mr. Autry?

MR. AUTRY: Your Honor, as to the count of Murder in the First Degree, the agreement is a sentence of life without possibility of parole. As to

Count 2, the Conspiracy to Commit Murder, we have no agreement on that with district attorney's office. We're pleading blind before the Court as to Count 2.

THE COURT: Okay. Is that your understanding, Mr. Fisher?

MR. FISHER: Yes, sir.

THE COURT: Before I ask for your plea, I'm satisfied that you have had a copy of the charges available to you, that you've been advised and understand your rights. It's necessary also to determine that there is some factual basis for any plea. That's the reason for this statement that is marked as Exhibit A. Did you write this out or your attorneys write it out for you?

MR. FISHER: I wrote it out, sir.

THE COURT: And you indicate that you along with an individual named Jeff Emmerson entered into an agreement to kill Kurt Whitt, that you transported him to Seminole County, that you had certain firearms with you, and that you all three did target shooting, that subsequent to that you indicate that Jeff shot Kurt and then you also shot him. And that is your statement of what this is all about. Do you understand that is the basis of the charge?

MR. FISHER: Yes, sir.

THE COURT: Okay. It would appear from the

statement that there would be a sufficient factual basis for a plea. All right, then, with your understanding of your rights and the charges and the basis for those charges, what is your plea to the charge of murder in the first degree?

MR. FISHER: Guilty.

THE COURT: And what is your plea to the charge of conspiracy to commit murder?

MR. FISHER: Guilty.

THE COURT: Do you have a copy of the information?

MR. DEVINNEY: We would waive reading with permission of the Court.

THE COURT: All right. The defendant has waived the right to have that read. All right, then, Mr. Fisher, you've entered your plea. Do you enter this plea of your own free will?

MR. FISHER: Yes, sir.

THE COURT: Without any coercion or compulsion of any kind, and only for the reason that you're guilty, and do you admit you did the acts charged?

MR. FISHER: Yes, sir.

THE COURT: Has anyone by force, abuse,

mistreatment, threats, or promises done anything to have you enter these pleas?

MR. FISHER: No, sir.

THE COURT: Okay. The State's recommendation on Count 1?

MR. PETERSON: Your Honor, as to Count 1, Murder in the First Degree, the State will recommend life without parole. On the conspiracy to commit murder there is no plea bargain on that. It's a blind plea.

THE COURT: You heard the recommendation. Do you understand that at this point this is only a recommendation, it is up to Court to impose sentencing?

MR. FISHER: Yes, sir.

THE COURT: All right. The Court finds that this defendant is competent to understand the nature, purpose, and consequences of this proceeding, that he was competent to appreciate and understand the acts committed on or about the date alleged in the information. All right. I see that you have executed a waiver of presentence investigation. Did you review this with your attorneys?

MR. FISHER: Yes, sir.

THE COURT: Do you understand that you have a right to a background study and report by the

Department of Corrections prior to sentencing? And I realize on the first degree murder charge there is a plea negotiation, but on the conspiracy charge - -

MR. DEVINNEY: We entered a blind plea, sir.

THE COURT: You want to waive presentence investigation; is that right?

MR. FISHER: Yes, sir.

MR. DEVINNEY: We ask the Court to impose sentence today.

MR. PETERSON: State waives, Your Honor.

THE COURT: With that, then, the Court will proceed to the sentencing stage. The Court finds that the plea of guilty has been knowingly and voluntarily entered. This has all been done in open court on the 31st day of August, 1992. This summary of facts form will be filed in the case, made a part of the record. Signed by the defendant, his attorneys, the State, the Court, the court reporter, and the court clerk all present today. All right. At this time, then, we're ready to proceed to sentencing. Does the State have anything further to present prior to sentencing?

MR. SHERROD: No, Your Honor.

THE COURT: And does the defendant wish to present anything further prior to sentencing?

MR. AUTRY: No, sir.

MR. DEVINNEY: No, sir.

THE COURT: The Court finds that the plea of guilty has been knowingly and voluntarily entered, that judgement and sentence will be imposed as follows: On Count 1 I'll follow the recommendation pursuant to the terms of the plea negotiation. You'll be sentenced to a term of life in prison and that will be imposed without the possibility of parole. On Count 2, conspiracy to commit murder, you will be sentenced to a term of ten years under the supervision and control of the Department of Corrections. Now, then, there is one final thing that I need to -- Well, what are the costs accumulated in this case? The costs in this case will be assessed in the amount of $1,412.16. We'll send a statement along to D.O.C. If you accumulate funds in your account they may withdraw those or pay those in to cover the costs. All right. One final thing, I've accepted your plea today as freely and voluntarily entered. There is however a right of appeal. In order to appeal from this conviction on a plea of guilty, you must file a written request to withdraw your plea of guilty within ten days from this date. You must set out in that in detail the reasons that you're requesting to withdraw your plea of guilty. If you file that request then we'll hold an evidentiary hearing within thirty days from the date you file it. And no question which requires an evidentiary hearing may be raised in a further appeal to the Court of Criminal Appeals unless your raise it on your application to withdraw your plea. If I refuse to allow you to withdraw your plea of guilty, you can

appeal that decision to the Court of Criminal Appeals. That is just a request for them to review the proceedings here. That has to be done within ninety days from this date. And when you file that - petition for Writ of Certiorari is the name of the proceeding - then you must give notice of that to the district attorney and to the attorney general. Do you understand basically that right of appeal and how to initiate that?

MR. FISHER: Yes, sir.

THE COURT: This summary of proceedings will be filed in the case and made a part of the record. The district attorney is directed to prepare a judgement and sentence on each of the counts in this matter to be filed in the case. You'll be remanded to the sheriff's custody at this time to be transported to D.O.C. custody. I see that you have filed a waiver of statutory time.

MR. DEVINNEY: If we may speak on that, Your Honor. As the Court knows, Mr. Fisher has several other charges now pending against him in this county. We feel that as matter of convenience that it would not be a hang up later on with him being transported, but we would ask that he be allowed to stay here at least two weeks to try to take care of those cases.

THE COURT: Okay.

MR. DEVINNEY: He's going to have an appointed lawyer we understand on those cases. We feel that with this sentence they should be able to –

MR. SHERROD: We can probably work that out, judge.

THE COURT: It might be better, if you want to wait that long, is not to file this, just to go ahead and you have your ten day waiting period. You can file it later if things work out and you're going to be transported early. I don't know that they'll be receiving it any quicker than that anyhow to tell you the truth. But if you're wanting the additional time here to try to work something out on the other cases, we'll just –

MR. AUTRY: We'll just keep that, Your Honor, and file it.

THE COURT: Okay. Any questions or anything further before we recess?

MR. PETERSON: May the State be excused?

THE COURT: Yes. We'll be in recess.

MR. AUTRY: Nothing further, Your Honor. Thank you.

* * * * * * * * *

STATE OF OKLAHOMA) SS.

SEMINOLE COUNTY)

CERTIFICATE

I, TERRI AZBELL, Certified Shorthand Reporter, within and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct transcript of my stenographic notes taken in Case No. CRF-91-274 had on August 31, 1992.

I further certify that I am not an attorney for, nor a relative of any of the parties involved in this action, nor otherwise interested in the events of the same.

WITNESS MY HAND AND SEAL this 7th day of November, 1997.

/s/_____
Terri L. Azbell, C.S.R.

APPENDIX L

AFFIDAVIT OF MRS. DEBBIE O. KERR
August 30, 1999

I, Mrs. Debbie O. Kerr, am the mother of Petitioner-Appellant, John Hadley Fisher.

I have previously testified under oath during my son's competency jury trial held in Oklahoma County on or about May 18, 1992, as to my observations, opinion and belief as to my son's mental condition.

I retained Mr. John K. Bounds, Attorney-At-Law, on July 17, 1997. Prior to that date I had not contacted nor retained any other counsel from the date of my son's convictions.

The reason I waited so long to retain counsel for my son was purely financial. After the death of my father, Marion Dale Dilbeck, on November 15, 1996, I came into an inheritance which could fund the legal help my son so desperately needed.

I hereby swear the above it true and correct.

/s/_____
Debbie O. Kerr

Subscribed and sworn before me this 30th day of August, 1999.

My commission expires: 03-16-03

/s/_____
Karen Lennox
Notary Public

APPENDIX M

Philip J. Murphy, Ph.D.
Clinical Psychologist
Biofeedback Neuropsychology
5100 N. Brookline Suite 715
Oklahoma City, OK 73112
(405) 942-2465

PSYCHOLOGICAL REPORT

Examinee: John Hadley FISHER
Date of Evaluation: 9/29/99
Date of Report: 10/11/99

PROCEDURES ADMINISTERED:
Bender-Gestalt Test
Bilateral Signature Task
Mental Status Exam
Digit Span
Wide Range Achievement Test: Reading subtest
Hand Test
Rorschach Test
Wechsler Memory Scale
Facial Recognition Test
Competency to Stand Trial Interview
Interview with Mr. Fisher's mother, Mrs. Debbie Kerr
Interview with James Rowan
Interview with William Devinney
Interview with John Bounds
Reading of the transcript of St. v. John Hadley Fisher (No. CF-91-5078), V.I, 5/18/92, & V.2, 5/19/92

BACKGROUND

The present examiner had on three previous occasions evaluated Mr. Fisher via psychological tests and interviews, once in October 0f 1991 for 3 ½ hours, again in February of 1992 for 2 hours, and then on May 18 of 1992 for 15 minutes. At those times the present examiner had concluded that Mr. Fisher was incompetent to stand trial and suffered from paranoid schizophrenia with a history of clinical depression possibly of a Bipolar type. I testified on 5/18/92 that Mr. Fisher was incompetent to stand trial. This opinion of Mr. Fisher's incompetence to stand trial was rendered under the Oklahoma standard prior to the Byron Cooper U.S. Supreme Court decision. It is this examiner's understanding that this Supreme Court decision found that the previous standard of a "clear and convincing" level of evidence be met in order for a defendant to be found incompetent to stand trial was unconstitutional. The U.S. Supreme Court directed the State of Oklahoma to change its standard to one of a "preponderance of evidence" standard to find a defendant incompetent to stand trial.

I visited with Mr. Fisher again on 8/25/92 in the Seminole County jail after his recapture from an jail escape which occurred on 8/19/92. It was my opinion at that time and presently that Mr. fisher suffered from such cognitive distortions due to his Paranoid Schizophrenia that he did not understand the nature, consequences or ramifications of his actions of his escape. He delusionally believed that he was being constantly watched by enemies of the cartel and escaped

from those agents, not the jailers of Seminole County. His behavior during his escape is a classic example of delusionally motivated bizarre and extremely violent behavior. He believed on the date of his escape that the officers who were trying to apprehend him were affiliated with the Mafia whom he believed had a contract for his execution. He also believed that his escape was the result of efforts by members of the Columbian drug cartel of which he is the head. My opinion and diagnosis of Mr. Fisher at that time and today is that he was insane at the time he committed the crimes which led to his conviction in Sequoyah County, CRF-92-170 and in Seminole County, CRF-92-233. Furthermore his mental illness of Paranoid Schizophrenia with its attendant delusional thinking rendered him incompetent to stand trial. I recommended that the jail physician medicate him on a daily basis with Thorazine, a sedating antipsychotic medication, to provide for his own and others' safety since he was out of control.

ORGANIZATION AND RATIONALE OF THIS REPORT:

Some introductory comments concerning the organization and rationale of the many tests and their findings below might be helpful to the reader. Diagnoses of physical or mental diseases and disorders are approached in the same fashion, through a careful analysis of the surface signs and symptoms and the latent signs and symptoms found in the patient. For example, if a patient felt a twinge in his knee one day and the next day awoke with a subjective experience of pain, that subjective complaint is a surface symptom. When he goes to the doctor and his doctor views the

swollen and reddened knee, that is an example of a surface sign of a disorder. It is obvious and apparent that something is wrong with the knee which corroborates the patient's surface symptom or complaint. The patient might by lying about a painful knee but cannot intentionally fake a swollen knee which is apparent to the doctor's eye.

What if the doctor received the patient's complaint of a painful knee but observed no inflammation? Two possibilities present themselves. Either the patient is mistaken or lying about his pain, or the surface symptom is not correlated with a surface sign. The doctors then orders a MRI to look for a latent sign of the cause of the complaint. If the MRI comes back positive with a finding of a small tear in the cartilage, that would be an example of a latent or underlying sign of the problem.

Finally there can be a latent symptom which is a symptom which is not apparent to the conscious experience of the patient. Using this example, the patient has no subjective experience of pain (surface symptom) the day after he feels the twinge in his knee, inspects his knee and finds no swelling (surface sign) and forgets it ever happened. Several months pass, the weather turns cold and wet and he awakens one morning and his knee is painful even though no swelling still exists. That would be an example of a latent symptom of the disorder which will be corroborated when the small tear in the cartilage is discovered only when the positive MRI comes back. The latent symptom is only experienced when the conditions are ripe for its

appearance.

This report's findings are organized, for the most part, via this model of surface and latent signs and symptoms of mental and emotional disorders. Additional sections deal with the intellectual and neuropsychological bases of this man's mental functioning.

The type and number of psychological and neuropsychological tests and other procedures were selected to provide a comprehensive examination of this man's mind via the collection of reliable and meaningful information. All procedures are accepted as standard within the field of psychology.

FINDINGS

Mr. Fisher is a brown haired and eyed 6'4" 215 lb., 27 year old single white male with no children. This present evaluation was conducted in a full contact setting in the Captain's office of A Unit at the Oklahoma State Penitentiary with the examiner and Mr. Fisher sitting on opposite sides of a large table with no one else in the room throughout the entire evaluation. Mr. Fisher was unshackled. The duration of the evaluation was two hours.

Intellectual estimates from the Reading Quotient derived from the Wide Range Achievement Test places him in the Bright Normal range of intellectual functioning with a Reading Quotient of 114. His general memory functioning was also in the Bright Normal range with a norm-corrected Memory Quotient of 112.

This two point discrepancy between the above two quotients is insignificant. This finding, along with no positive screens for an organic brain disorder on three other separate tests, produces the conclusion that he does not suffer from any organic brain disorder.

Developmental visual-motor testing found no evidence of developmental delays which would fit his history of neither maturational delays nor difficulties in his academic history.

Organic visual-motor testing found no surface or latent signs of organic brain disorder.

Surface Symptoms of Psychiatric Disturbance:

While Mr. Fisher would not consider the following a symptom of any disorder because he lacks total insight into the fact that he is seriously mentally ill, his delusional system, i.e. his being "a martyr to the cause" of the (Columbian) syndicate who are competing with the Mafia, is a clear surface symptom of a psychotic thought disorder of either a Delusional Disorder type or a Paranoid Schizophrenia type.

He still believes that when the time is right he will be rescued from any place of incarceration regardless of the level of security by his syndicate operatives. He asserts, "People I work for will get me out. When it comes time to get me out they'll do it." He states that his "attorney has no power over getting me out." He submits that he is only placating his parents by cooperating with his attorney. He then directed me to tell no one that he had

spoken to me about these matters since it would get back to the syndicate and that might endanger him from them, i.e. the (Columbian) syndicate.

His response to the question, if he ever say anything out of the corner of his eye which then was not there?, was "I think they're scheming on me. I don't see it out of the corner of my eye but I know that they're watching me. That's why I had to escape because they were watching me all the time. The Mafia, they want to kill me for real. The police want to kill me too but they're easy. They're chumps. They hit my truck 67 times (Reference to his escape from the Seminole County Jail in 1992.) and couldn't kill me...The Crips tried in the Oklahoma County jail. (Reference to a real attack in 1991, which necessitated jaw surgery just one week prior to the present evaluation.) They don't give me the credit that I'm harder to kill than they think."

His response to a query about having homicidal thoughts is "When I get mad, I get real bad. It's best for me to go to bed because I scare people. There's a bunch of people who need to die."

He reports that he had one suicide attempt in 1991 which was documented via evidence presented at his competency hearing in May of 1992 (CF-91-5078). Other surface symptoms include his being continuously awake for a 96 hour period without being under the influence of any drugs, his being awake periodically for 36 hours when he is in a good mood and being asleep for days at a time when he is in a bad mood.

The above summary of his surface symptoms which represent a fairly complicated delusional system of a paranoid and grandiose type, typically found in psychotically thought disordered individuals who suffer from either Paranoid Schizophrenia or Delusional Disorder.

Surface Signs of Psychiatric Disturbance:

The following findings relate to those observable behaviors or professional interpretations of both verbal or physical behaviors which have diagnostic meaning to an examiner which would not be apparent to the examinee but are somewhat obvious in his behavior.

The first surface sign was the hypervigilence which motivated the holding in immediate memory of a string of 9 orally presented numbers in a forward direction and 7 numbers in a reverse direction. This corresponds with his surface symptom of knowing that others were constantly watching him, which would be based on a likely visual hypervigilence.

Hypervigilence is a state of having one's perceptual faculties on full alert and scanning the environment for cues of a potentially threatening nature. It is a result of extreme fear. Hypervigilence is found in two psychotic disorders: Paranoia and Post Traumatic Stress Disorder. His Bright normal intellect would not explain his ability to hold the retention of a string of this many numbers.

The second surface sign was his, at times, paranoid demeanor during the evaluation where his eyes would

narrow and his voice would lower as he would tell me something of a paranoid nature.

The third surface sign was his response to several questions of common sense and judgment from the Wechsler Adult Intelligence Scale - Revised which was part of the Mental Status Exam part of this evaluation. In response to the question, what is the thing to do if you find an envelope in the street that is sealed and addressed and has a new stamp? He responded after a long pause and a paranoid change in his demeanor with "Whose envelope was it?..If it's your enemy's, don't send it." In response to the meaning of the proverb, people in glass houses should not throw stones, he stated "If someone is weak they should not mess with someone who is strong because the stronger will break your glass house." This response comes after the correct answer to a more difficult proverb.

One verbalization he made during the Rorschach Test relates to his fixed and overvalued ideas concerning power and dominance. "They're two tigers fighting over who's to have dominance over this mountain here...People don't get the underlying concept that there is no right or wrong, just what society says it is...Power is a wonderful thing if it's wielded correctly by people who understand this concept."

The fourth set of surface signs are derived from a surface personality test. He presents with a defensively withdrawn and perturbably impulsive personality style, which is consistent with a Paranoid Disordered person. While one indicator on this test to assess potential for

aggressive or negative behavior was in a prosocial direction and would predict against his typically being nonaggressive, this would hold only in situations where he liked the people with whom he was interacting. If he were in a situation with people not to his liking and he were triggered by some association of threat to himself, he could react impulsively in an aggressive fashion. However more usually his behavior would simply be withdrawn from others.

It is likely that he has received a history of being well-nurtured during childhood which fits the reality of his mother's behavior towards him. But he shows no evidence of a history of being a recipient of good fathering. This would fit his latency years' experience of an absence of a father during most of his childhood.

He was at the time of this evaluation consciously suffering from a moderate degree of psychological distress marked by much insecurities and dysphoric affect. He also showed a basic ambivalence between love and hate which is the capacity to experience both of these polar opposite emotions at the same time and towards the same target. This capacity is quite specific for Schizophrenia.

Stressful circumstances provoke insecurities in him. He likely experiences emotional remorse for previous aggressive behavior, even though it is unlikely that he would have insight into this emotional dynamic. Perplexing circumstances can trigger immature behavior and thinking. He is excessively dependent upon others as he looks towards the future; this finding fits his

delusional fantasy of being rescued by others when they believe the time is right.

Latent Symptoms of Psychiatric Disturbance:

While this present evaluation did not include the administration of a Minnesota Multiphasic Personality Inventory - 2, my first evaluation during October of 1991 did include this test and his subsequent evaluation in December of 1991 at Eastern State Hospital also utilized this same test. The results of these testings two months apart were basically identical.

This test of latent symptoms of psychiatric disturbance found a classic code type for diagnosis of Paranoid Schizophrenia.

An earlier testing with the MMPI-2 in the summer of 1990 when he was just turning 18 years of age found no evidence of paranoia but evidence of severe depression which resulted in an inpatient hospitalization and treatment with antidepressant medication.

Schizophrenia is a disease which previously had been called dementia praecox which meant a chronic progressive psychiatric dementia which began in the years from late adolescence until early adulthood. This information leads the present examiner to posit that his schizophrenic process became symptomatic sometime during this year between these testings.

Latent Signs of Psychiatric Disturbance:

One test for the assessment of latent signs found the use of the primitive defense mechanism of denial. This would correspond to his tenacious hold onto the delusion that he is simply awaiting recuse by the syndicate. He avers that he can escape from anywhere at anytime he wanted to, but then he backs off by deferring the timing of his release to his being "a martyr to the cause" of the (Columbian cartel) syndicate.

This test also found a second latent sign of stress vulnerability with the experience of anxiety, withdrawal, timidity and emotional constriction. This fits with aforementioned surface sign of hypervigilence.

A second test for latent signs of psychiatric disturbance produced several significant findings.

First, his underlying reality testing is in the psychotic range with an X+ % of 57%. Any measure under 60% is within the psychotic range. Normals almost always have measures in the 80% or above range. Measures between 60% to 70% are evidence of borderline reality testing. This measure of underlying reality testing signifies the mind's capacity to discern the subtle perceptions concerning the world around it which provides the basis for successful negotiation of life in a consensually understood reality with other people.

This defect in his underlying reality testing as a latent sign matches his statements concerning how others cannot understand the concept of good and evil and power which was an aforementioned surface sign.

Second, sophisticated constellation analyses of this test's findings led to a second significant finding of a hypervigilence in his information processing. This hypervigilence was based upon extensive energy given to processing of perceptual information and an over concern with minute details. But his processing uncharacteristically haphazard rather than overly cautious.

He is guarded and distant with others, but his perceptions are not motivated by excessive anger.

This describes a clinical picture of someone whose paranoid defenses are so chronic that they have led him to be so withdrawn from others that he can afford to be haphazard in his scanning of the environment and so withdrawn from the negative effects of others upon him that he needs not be immersed in excessive anger towards them. His delusions protect him from psychological anguish.

This certainly fits everyone's view of him as being completely unconcerned with his fate. However he is still left with the sign of hypervigilence which is a result of his paranoia. This latent sign of hypervigilence matches the aforementioned surface sign of hypervigilence.

ASSESSMENT OF MALINGERING OR FEIGNING MENTAL ILLNESS:

All forensic psychological evaluations are required to

assess the probability that the results of the evaluation was based upon malingered or intentionally dishonest reporting by the examinee. This is best done not simply via a certain elevation on a scale measuring a particular response set. It needs to include that type of assessment, but more importantly it needs to gauge the motivation of the subject and his attempts to "fake bad" and put that within the context of the consistency of his symptoms and his signs of psychiatric disorder. The present evaluation is organized to assess both the signs and symptoms of any disorder which might be present in Mr. Fisher. First, he did not endorse absurd symptoms which are frequently found with malingering examinees. He has seen a car within the last ten years and his picture was not on the cover of national magazines within the past year. He knows his identity.

Second, he denied any hallucinations of any type. He also denied that there was anything psychologically wrong with him. This lack of insight is characteristic of psychotic individuals.

Third, he asserted that the only psychotropic medication which had any effect upon him was Prozac. It had a negative effect upon him by making him more intense. This finding, in fact, is another latent sign of a thought disorder or other serious psychiatric disorders. He claimed that many neuroleptics, such as Thorazine, Haldol, Mellaril and Prolixin which he received when he was incarcerated in both the Oklahoma and Seminole County jails in 1991 and 1992, had no effect upon him. This was contradicted by testimony during his competency hearing of 1992 in the case of Thorazine

which had a profound effect upon him. However, this effect, given a short term dose, is not diagnostic of any mental disorder.

Fourth, the consistency of the clinical symptoms and signs found during the present evaluation is the evidence that he was not malingering. This finding, coupled with the remarkable fixity and strength of his delusions from 1991 to 1999, is the best proof that his is an accurate representation of his mental capacities.

SUMMARY:

Mr. Fisher is a man who is suffering from Paranoid Schizophrenia or another serious mental disease such as Delusional Disorder. He is seriously mentally ill with a disorder which invades his capacities to assess reality correctly and produces a withdrawal from his legal situation to the degree that he cannot rationally and effectively assist his counsel.

He is neither competent to stand trial now nor was he competent to stand trial in 1991 or 1992. This was true in 1992 under the unconstitutional standard of clear and convincing evidence that he was incompetent. Under the present less stringent standard of preponderance of evidence, it is still true today. His psychiatric condition remains completely unchanged from 1991/1992.

CONCLUSIONS:

1. Mr. Fisher's mental illness of Paranoid Schizophrenia

with its attendant impaired reality testing and fixed delusional system made it impossible for Mr. Fisher to rationally and effectively assist his counsel. The complaints from Mr. Rowan, Mr. Devinney and Mr. Bounds are quite similar to each other. He does not discuss the elements of his cases with his attorney because he has no interest in such matters since his delusions inform him that his remedy is not through the law but via his Columbian cartel compatriot's rescue efforts.

2. From my understanding, Mr. Fisher pled guilty in Seminole County, CRF-91-274 on 8/31/92. It is my opinion that Mr. Fisher was incompetent to plead guilty at that time. Mr. Fisher has been incompetent to stand trial or enter into any legal decisions since I first saw him in 1991 until the present. His condition has been remarkedly fixed and has not varied in nature or severity from 1991 until the present. I have no reason to believe that he has had any periods of time within this 8 year envelope when he was legally competent. His delusions distort his rational understanding of the consequences of any pleas which he would have made during this period of time. Since he believes that he is only incarcerated at the behest of the Columbian cartel for whom he is a temporary martyr, legal pleas have no meaning to him. His underlying impaired sense of external reality and his psychotic withdrawal within himself render him incompetent.

3. During my last visit with Mr. Fisher on 9/29/99, I observed Mr. Fisher's interaction with his present attorney, Mr. John K. Bounds. It has been my opinion

in the past with his other attorneys and presently with Mr. Bounds that Mr. Fisher has been either completely unable or significantly lacking in the following categories: -

a. Mr. Fisher's capacity to disclose to his attorney pertinent facts surrounding the alleged offense.

b. Mr. Fisher's capacity to relate to his attorney.

c. Mr. Fisher's ability to assist his attorney in planning a defense.

d. Mr. Fisher's capacity to realistically challenge the prosecution witnesses.

e. Mr. Fisher's ability to testify relevantly.

4. Mr. Fisher's counsel, Mr. Bounds, has specifically requested me to address the following issues in this report.

a. It is my clinical opinion that Mr. Fisher could not pursue any type of appeal on his own behalf. The combination of the complexities of the legal system and his fixed delusional system with his being an international drug lord awaiting rescue by his Columbian drug cartel compatriots totally preclude Mr. Fisher's ability to understand, find or formulate a basis for his appeal or to exercise due diligence with said appeal thereafter.

b. It is also my opinion that absent counsel, Mr. Fisher could never have formulated any appeals on his own behalf.

Pursuant to defense counsel's request, I have issued this report as to my findings and diagnosis of Mr. Fisher's overall mental health on the above dates.

Respectfully Submitted,

/s/_____

Philip J. Murphy, Ph.D.,
DABFE, DABPS

Diplomates in Forensic Examination and Forensic Neuropsychology